SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 681

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINES, INC.,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

JURISDICTIONAL STATEMENT OF APPELLANT

To the Justices of the Supreme Court of the United States:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

I

This Court has jurisdiction to review the above entitled cause on appeal by virtue of the provisions of the following statutes of the United States, to wit: 38 Statutes 220, U. S. C. A. Title 28, paragraph 47, which provides that an appeal may be taken direct to the Supreme Court of the United States from an order denying an injunction against, or refusing or denying to set aside an order of the Interstate Commerce Commission made by a District Court.

II

The decree of the District Court denying the injunction, and refusing to set aside the order of the Interstate Commerce Commission and dismissing the suit was entered July 8, 1946, and the petition for appeal therefrom was filed on August 2, 1946.

III

That the appellant, W. H. Tompkins Company, now Tompkins Motor Lines, Inc., seasonably filed an application under the "grandfather clause" of the Federal Motor Carrier Act of 1935, in which it sought a certificate from the Interstate Commerce Commission authorizing the transportation of general commodities in radial service between Nashville, Tennessee and points and places within 15 miles thereof, and Murfreesboro, Tennessee on the one hand, and points and places in Georgia, North Carolina, South Carolina, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida Highway 30. The Interstate Commerce Commission ruled that the applicant was only entitled to a certificate which would authorize transportation of only special commodities from Murfreesboro, Tennessee to points in Georgia, and a specified portion of Florida, over irregular routes, and special commodities from and to Nashville, Tennessee on the one hand and points in Georgia, North Carolina, South Carolina, and specified portion of Alabama and Florida on the other hand, over irregular routes, or about one fourth of the territory claimed by Applicant.

This suit was filed in the District Court to set aside said order and enjoin the enforcement thereof, on the grounds that the action of the Commission was arbitrary, and capricious and not according to law. No temporary restraining order was issued because the Commission, at the request

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of the Court, extended the effective date of the order denying part of Appellant's application, and the case was presented for final determination at the hearing for an interlocutory injunction, and the Interstate Commerce Commission later granted Appellant temporary authority to perform the operation which it denied to Appellant in its order of January 6, 1946.

The District Court affirmed the decision of the Commission, denied the injunction, and dismissed the bill. A copy of the decision of the District Court is appended hereto.

WHEREFORE we respectfully submit that this Court has jurisdiction of this appeal by virtue of 38 Statutes 220, U. S. C. A. Title 28, paragraph 47, as aforesaid.

Respectfully submitted,

JAMES W. WRAPE,
HAROLD G. HERNLY,
WRAPE & HERNLY,
1407 Sterick Bldg.,
Memphis, Tennessee,
Attorneys for Appellant.

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DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 603 Civil

W. H. TOMPKINS COMPANY, Now Tompkins Motor Lines, Inc.,

Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants

ORDER

Before Hicks, Circuit Judge, and Taylor and Davies, District Judges

The Bill of Complaint is dismissed upon the grounds and for the reasons set forth in the Findings of Fact and Conclusions of Law this day filed in this case.

Approved for Entry:

(S.) Xen Hicks,
United States Circuit Judge.
(S.) Geo. C. Taylor,
United States District Judge.
(S.) Elmer D. Davies,
United States District Judge.

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DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 603 Civil

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

FINDINGS AND CONCLUSIONS

The above entitled action came on for hearing before the duly constituted statutory court on November 23, 1945, and was submitted upon the pleadings, exhibits, arguments, and briefs of counsel for plaintiff and defendants, and the Court enters its findings of fact and conclusions of law, as follows:

Findings of Fact

1. That the plaintiff is a corporation existing under the laws of the State of Tennessee with its principal place of business within the jurisdiction of this Court.

2. That the plaintiff is engaged in the business of a motor carrier, operating as a common carrier in interstate commerce within the states of Tennessee, North Carolina, South Carolina, Georgia, Florida, and Alabama, and has been so engaged long prior to June 1, 1935. That an application was filed by the plaintiff with the Interstate Commerce Commission on February 12, 1936, seeking a certificate of public convenience and necessity that would author-

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ize it to continue its operations under the provisions of Section 206 (a), Motor Carrier Act of 1935. That this application was referred to an examiner of the Interstate Commerce Commission for hearing, and the examiner, in due course, served his recommended report and order, to which exceptions were filed by the plaintiff and other parties of interest in that hearing. That on May 29, 1941, Division 5 of the Interstate Commerce Commission served its report and order on this application. That the original application, all exhibits introduced at the hearing before the Examiner, a transcript of the proceedings before the Examiner, copies of his recommended report and order, and copies of all other orders entered by the Interstate Commerce Commission have been introduced as exhibits in this cause.

3. That the application, as originally filed, was amended and the plaintiff now seeks authority to continue certain operations over both regular and irregular routes, as follows:

Over regular routes, in the transportation of commodities generally:

Between Nashville, Tennessee, and Atlanta, Georgia, via U. S. Highway 41.

Over irregular routes, transporting general commodities:

Between Nashville, Tennessee, and points within 15 miles thereof, and Murfreesboro, Tennessee, on the one hand, and points and places in the state of North Carolina, South Carolina, Georgia, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida State Highway No. 30.

4. That an order of the Interstate Commerce Commission, entered on May 29, 1941, provided for the issuance of a Certificate of Public Convenience and Necessity to the

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plaintiff, which would authorize the regular route service, as applied for, between Nashville, Tennessee, and Atlanta, Georgia, in the transportation of general commodities: and the transportation of certain specific commodities, over irregular routes as follows:

From Nashville, Tennessee, to points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama on the east of U. S. Highway 31, and that part of Florida on and north of U. S. Highway 30, in the transportation of packing house and dairy products;

From Murfreesboro, Tennessee, to points and places in Georgia and Florida, on and north of U. S. Highway 30, in the transportation of dairy products;

And from points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama on and east of U. S. Highway — (from the Tennessee-Alabama state line to Phenix City, Alabama) to Nashville, Tennessee, in the transportation of cotton factory products;

And from points and places in Florida, on and north of state Highway 30 to Nashville, Tennessee, in the transportation of canned and fresh fruit and canned fruit juices;

And from Jacksonville, Florida, to Nashville, Tennessee, in the transportation of coffee;

And from Elberton, Georgia, to Nashville, Tennessee, in the transportation of granite;

From Savannah and Port Wentworth, Georgia, to Nashville, Tennessee, in the transportation of sugar.

This order was set aside in part by this court on July 7, 1942, in cause No. 258, *W. H. Tompkins Company* v. *United States of America, et al.*

Thereafter, the Commission issued two reports on reconsideration, the last report dated January 6, 1945, being the order which plaintiff here seeks to set aside.

By said report and the order the Commission provided for the issuance of a Certificate of Public Convenience and Necessity to plaintiff which would authorize plaintiff to conduct the identical operations, with the identical restrictions, as was contained in the Commission order of July 1, 1943, which was heretofore set aside by this Court.

5. While the Commission found that the plaintiff had conducted common carrier operations within the area in which plaintiff sought to continue to operate, the plaintiff's operations are continued to be curtailed in the following way:

1. Plaintiff's right to serve the Metropolitan area surrounding Nashville, Tennessee, is denied;

2. Plaintiff is denied the right to transport all items of a general class between all points in its territory; and

3. Plaintiff is denied the right to transport all items authorized between all points.

Conclusions of Law

1. This Court has jurisdiction of this cause and of the parties thereto.

2. This Court's decision under date of July 7, 1942, in Civil Action No. 258, setting aside the Commission's order of May 29, 1941, and remanding the case to the Commission for findings in accordance with the statutory standards set forth in the decisions of the Supreme Court on March 2, 1942, in *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, and *Howard Hall Company* v. *United States*, 315 U. S. 495, did not preclude the Commission from exercising its statutory function of considering, passing upon, and deciding upon plaintiff's application in accordance with applicable law and the evidence of record in the

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proceeding before the Commission; nor does the said decision of July 7, 1942, with respect to the Commission's said order of May 29, 1941, operate under the doctrine of *res judicata* as a determination that the Commission's subsequent order of January 6, 1945, is in any respect unlawful or invalid.

3. The Commission had jurisdiction over the proceedings wherein the said order of January 6, 1945, was made, and to make the said order. Said order was within the constitutional and statutory authority of the Commission, and was not arbitrary or based upon mistake of law or misapplication of the proper standards. Said order was made by the Commission upon substantial evidence of record and in accordance with the applicable law and was and is valid and lawful in all respects.

4. The relief prayed for in the complaint should be denied, and the complaint dismissed, plaintiff to pay the costs.

Judgment accordingly.

(S.) XEN HICKS,
United States Circuit Judge.
(S.) GEO. C. TAYLOR,
United States District Judge.

I am of the opinion that the Commission acted arbitrarily in denying to plaintiff the right to transport a general class of commodities between its radial bases and all points in its territory, and that the limitation placed on plaintiff's activities in this respect was without statutory sanction and is a denial of plaintiff's rights. It appears that the Commission improperly restricted plaintiff's actual operations and prior opportunities beyond the requirements of the statute, and, apparently, ignored the history of plaintiff's holding out as a carrier of general commodities in con-

junction with its actual operations, by limiting plaintiff's operations to a strict pattern of prior activities during a relatively small period of time, and did not take into consideration seasonal shipments, which action of the Commission is unwarranted and unsupported by the record in this case.

I am, therefore, of the opinion that the Commission has not properly applied the statutory standards prescribed by the Congress and the principles announced by the Supreme Court in the cases of *U. S.* v. *Carolina Carriers Corp.* (315 U. S. 475) and *Howard Hall Co., Inc.* v. *U. S. et al.* (315 U. S. 495). It appears that the order complained of is practically identical with the order set aside in part by this Court on July 7, 1942, and it does not appear that the Commission followed the mandate of this Court requiring it to apply the statutory standards and tests held by the Supreme Court to be essential to a valid order, or that the Commission applied any standards other than those applied in the first instance.

In my opinion, plaintiff's bill should be sustained, and the relief prayed for granted.

This 5th day of July, 1946.

(S.) ELMER D. DAVIES,
United States District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINES, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

No. .....

REPLY

Of W. H. Tompkins Company, Now Tompkins Motor Lines, Inc., on Motion to Affirm Filed on Behalf of Appellees.

Appellant files this, its reply to the Appellees' Motion, pursuant to the provisions of Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, said reply being filed in opposition to the motion to affirm the decree of the District Court.

As stated in the motion to affirm, this case involves a direct appeal from a final decree entered on July 8, 1946, of a specially constituted District Court of Three Judges, established pursuant to the Urgent Deficiency Act of October 2, 1913, which decree dismissed Appellant's complaint to set aside an order of the Interstate Commerce Commission. An appeal from this decree was allowed on

August 2, 1946, and the motion to affirm was filed in the office of the Clerk of the United States District Court for the Middle District of Tennessee (Nashville Division), at Nashville, Tennessee, on August 19, 1946.

It is the contention of the Appellant that the Supreme Court of the United States has jurisdiction to review this cause on appeal, by virtue of the provisions of the Statutes of the United States, to-wit: 38 Statute 220, U. S. C. A., Title 28, paragraph 47, which provides that an appeal may be taken direct to the Supreme Court of the United States from an order denying an injunction against, or refusing or denying, to set aside an order of the Interstate Commerce Commission when made by a District Court.

SCOPE OF MOTION TO AFFIRM.

As we read and understand the motion to affirm, the Appellees do not question the jurisdiction of the Supreme Court to review the decree of the District Court, but the Appellees simply confine themselves to a demand that the decree of the District Court be affirmed on the sole basis that a "substantial question" is not involved.

A HISTORICAL STATEMENT OF THE PROCEEDINGS.

The nature and tenor of the motion filed by Appellees seems to require us to present a detailed statement containing a historical narrative of the proceedings out of which this suit originated.

The Appellant seasonably filed an application with the Interstate Commerce Commission, pursuant to the provisions of paragraph 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. A., 306), which paragraph is commonly referred to as the "grandfather clause".

In this application, the Appellant asserted presumptive rights to a Certificate of Public Convenience and Necessity

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which would authorize it to continue its operations as a common carrier, by motor vehicle, of general commodities (with exceptions not here pertinent) in both regular and irregular route operations.

The Appellant's claim to the right to continue to transport general commodities in **regular route service**, as finally presented to the Commission, embodied an operation between Nashville, Tennessee, and Atlanta, Georgia, over U. S. Highway 41, which right was recognized and granted, and that portion of the Commission's order is in no way involved in these proceedings.

The claim of Appellant to continue to engage in the transportation of a general class of commodities, **over irregular routes** as finally presented to the Commission embodied an operation between Murfreesboro and Nashville, and points within fifteen miles of Nashville; on the one hand, and all points and places in the States of Georgia, North Carolina and South Carolina, and those points in Alabama on and east of U. S. Highway 31, and those points in Florida on and North of Florida State Highway 30, on the other.

The Appellant was incorporated in February of 1935[1] to take over the operations of its predecessor, W. H. Tompkins, and it seasonably filed an application with the Interstate Commerce Commission under the provisions of Section 206(a)[2] of Part II of the Interstate Commerce Act, as amended (49 U. S. C. A. 306), which was docketed by the said Commission as MC-20783.

By this application, the Appellant asserted presumptive rights to a Certificate of Convenience and Necessity which would authorize it to continue to engage in the transpor-

1 Originally its corporate name was "W. H. Tompkins Company," and this name was later changed by corporate amendment to "Tompkins Motor Lines, Inc."

2 Commonly referred to as the "grandfather clause" provision.

tation of a "general class" of commodities[3] as a common carrier, by motor vehicle, in interstate and foreign commerce, over both regular and irregular routes in the following operations:

a. Via regular routes,

(1) Between Nashville, Tenn., and Atlanta, Ga., over U. S. Highway No. 41, and

(2) Between Nashville, Tenn., and Birmingham, Ala., over U. S. 31.

b. Via irregular routes,

Between points and places in the States of Tennessee, Florida, Georgia, North Carolina, South Carolina and Virginia.

This application was duly set for hearing September 1, 1937, before an Examiner and heard on a complete record, in which hearing various motor, rail and express carriers as protestants, participated. In due time (January 21, 1938), the Examiner served his report, in which he recommended the issuance of a certificate which would authorize the applicant to continue to transport, as a common carrier, (1) a general class of commodities over **regular routes,**

(a) Between Nashville and Atlanta

(b) Between Nashville and Birmingham, and (2) over **irregular routes,**

(a) Special commodities[4] from Nashville and Murfreesboro, Tenn., to points in Alabama (on and east of U. S. Highway 31), Florida (on and north of Florida State Highway No. 30), Georgia, South Carolina and North Carolina, and

(b) A general class of commodities from points in Alabama (on and east of U. S. 31), Florida (on

[3] With exceptions not here pertinent.

[4] Packing-house and dairy products and supplies.

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and north of Florida 30), Georgia, South Carolina and North Carolina to Nashville and Murfreesboro, Tennessee.

Exceptions to the Examiner's proposed report were filed by Appellant and by the protestants, and oral argument was held by Division V of the Commission. In its exceptions Appellant abandoned[5] is claim to the right to conduct (1) a regular route operation

(a) Between Nashville and Birmingham,

and its claim to conduct (2) an irregular route operation

(a) To the State of Virginia

(b) To that part of Alabama west of U. S. 31

(c) To that part of Florida south of Florida Highway No. 30

(d) To that part of Tennessee other than "Middle Tennessee."[6]

On May 29, 1941, the Commission, by Division V, served its report,[7] in which it provided for the issuance of a certificate which would permit the Appellant to continue to operate as a common carrier by Motor vehicle, in the following operations:

"(a) General commodities, except commodities in bulk, livestock, dangerous explosives, articles of extraordinary value, and household goods as defined in **Practices of Motor Common Carriers of Household Goods**, 17 M. C. C. 467; Between Nashville, Tenn., and

[5] See Commission Report MC-20783, 29 M. C. C. 359, 360.

[6] The propriety of such an amendment was dictated by the trend of the Commission's decisions on "grandfather clause" applications rendered subsequent to the hearing before the Examiner.

[7] Reported in 29 M. C. C. 359, a copy of which is included in Exhibit 1 introduced in the trial before the District Court. This order also disposed of Appellant's application in Docket MC-20783, Sub. No. 1, which is an entirely different proceeding, heard on an entirely different record, and which docket is in no way concerned in this case.

Atlanta, Ga., over U. S. Highway 41, serving no intermediate points.

"(b) Special commodities, over irregular routes, as shown below:

"Packing-house and dairy products, eggs, and poultry from Nashville to points in Georgia, North Carolina, South Carolina, those in Alabama on or east of U. S. Highway 31, and those in Florida on or north of Florida Highway 30.

"Dairy products, eggs, and poultry from Murfreesboro, Tenn., to points in Georgia and those in Florida on or north of Florida Highway 30.

"Cotton factory products from points in Georgia, North Carolina, and South Carolina, and those in Alabama on or east of U. S. Highway 241 (from the Tennessee-Alabama State line to Phenix City, Ala.), to Nashville.

"Canned and fresh fruits, and canned fruit juices from points in Florida on or north of Florida Highway 30 to Nashville.

"Coffee from Jacksonville, Fla., to Nashville.

"Granite from Elberton, Ga., to Nashville.

"Sugar from Savannah and Port Wentworth, Ga., to Nashville."

The restriction in the report as to the commodities to be transported in the irregular route operations was said to be justified by the Commission's stated policy to the following effect:

"We have repeatedly stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the 'grandfather' clause of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. Therefore, we conclude that applicant's 'grandfather' rights in respect of the irregular-route operations must be limited to the transportation of special commodities from and

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to the specific points and territories as described in the preceding paragraph."[8]

A petition for reconsideration was filed, and in such petition the Appellant further agreed that its Tennessee irregular route operations might be further restricted to

"Murfreesboro and Nashville and points within 15 miles of Nashville," as a radical base.

This petition was denied by the Commission as a whole.

Thereafter, a suit was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, and on July 7, 1942, in Civil Action 258, that court remanded the case to the Commission,[9] ordering:

"(3) That this cause be remanded to the Interstate Commerce Commission for basic and essential findings as required and pointed out in **United States of America et al. v. Carolina Freight Carriers**, and in **Howard Hall Co. v. United States et al.**, both of which cases were decided by the Supreme Court on March 2, 1942." (Emphasis added.)

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8 This policy has been referred to as the "Powell Bros. doctrine," because it was first announced in a decision involving that carrier (9 M. C. C. 785, 791-792). In 29 M. C. C. 359, at 364, on the application **Carolina Freight Carriers Corporation**, 24 M. C. C. 305, at 308, the Commission stated an identical policy, as follows:

"Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the 'grandfather' clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

Because of the "influence of the (expressed) views" you remanded the Carolina Carriers case, 315 U. S. 475, and that of the Howard Hall Company, 315 U. S. 495, to the Commission for findings consistent with your opinion in those cases.

9 A copy of the Findings of Fact and Conclusions of Law in **W. H. Tompkins Co. v. United States et al.**, Civil Action 258, is included in the Appendix to this reply.

This case was presented to the Statutory Court subsequent to the time of the Supreme Court decisions in the **Carolina** and **Hall Company** cases, but nevertheless the Appellees insisted most earnestly before that court that the Commission's decision of May 27, 1941, was entirely justified. Although the court decision was adverse to the government's position, no appeal was taken from the District Court's decision, and the Appellant felt that its just claims had been recognized and would be accordingly disposed of, when the Commission, on its own motion, reopened the proceedings for further consideration upon the record as previously submitted and without provision for further hearing.[1]

However, on July 1, 1943, a REPORT OF THE COMMISSION ON RECONSIDERATION was served by Division V,[2] in which the **identical commodity restrictions** imposed in the **Report of May 29, 1941**, were again imposed in the certificate there provided.[3]

The Commission declared in this report that it recognized the invalidity of its prior order, stating:

> "The Commission has vacated and set aside the prior order, upon its own motion, recognizing that findings in that report were insufficient in the light of **principles established** by the Supreme Court in the Carolina opinion. Findings herein are intended to clearly state the basis of our conclusions and to conform to principles stated by the Court" (42 M. C. C. 349). (Emphasis added.)

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1 In the Howard Hall Co. case the Commission, after the decision of this court on March 2, 1942, reopened that docket for further hearing and subsequently granted the right to that carrier to transport a general class of commodities. See MC-42318, decided November 22, 1944. This report not printed "in full" in the I. C. C. Reports.

2 42 M. C. C. 349, introduced as Exhibit 2 before the District Court in this proceeding.

3 It should be noted that in this report the Commission eliminated any statement of policy comparable to the condemned "Powell Bros. doctrine."

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It justified the commodity restriction imposed in connection with the irregular route operation upon the basis that the equipment used in the "irregular route" operations was **different** from that used on the "regular route" operation (where the transportation of a general class of commodities was authorized), and that such irregular route equipment was **"specialized"** and of the **"refrigerator type,"** stating:

> "The evidence submitted does not disclose with respect to the regular-route operation the use of equipment different from the special type used in the irregular-route operations, hereinafter discussed, **or that different commodities were transported in substantial volume in the regular-route operation than in the irregular-route operations.** There is ample justification upon the record here considered to deny applicant authority to transport general commodities over the regular route and to include that as a part of the irregular route operations, with authority to transport only specified commodities. However, protestants did not seriously question the regular-route operation, and in view of the fact that additional evidence might have been submitted to more definitely support the regular-route operation had that been made necessary, **there is sufficient warrant in the liberal assumption that this operation was conducted with different type of equipment than that used in the irregular-route operations and that commodities other than those shown by the exhibits may have actually been transported.** Only by such an assumption is the grant of authority to transport general commodities over the regular route warranted. **For the reason stated, the discussion hereinafter as to special equipment is intended to refer only to the equipment used in the irregular-route operations, and not that used in the regular-route operation."** (Emphasis added.)

And, further:

> "Applicant, having its headquarters at Nashville,

designed a service out of that city and Murfreesboro, which is approximately 30 miles out of Nashville, transporting almost exclusively packing-house and dairy products, **articles requiring refrigeration. All of its equipment used in its irregular-route operations is of the refrigerated type.** The transportation of perishable products was the primary business of applicant, and all other transportation service was made to conform thereto. **For this reason, applicant provided itself with the special equipment necessary to the service rendered in its primary business, equipment providing refrigeration, and such equipment is not suitable to the transportation of a wide variety of general commodities.** This explains why the outbound service from Nashville and Murfreesboro was practically limited to perishable freight. Likewise, it explains in a large measure why only a few commodities were transported in the reverse direction. Return loads for such equipment are commodities picked up at or near delivery points on shipments out of Nashville and Murfreesboro **that could be transported in this special type of equipment without damage thereto.** Such other commodities, for example, as the heavy iron and steel products out of Birmingham, Alabama, were not transported except perhaps experimentally, as the one load of iron products from Birmingham. **The use of special equipment and the limitation of commodities that could be transported therein without damage was therefore a restriction self-imposed by applicant.** For the foregoing reasons, we conclude, with respect to the irregular-route operations, that applicant was not, on June 1, 1935, and continuously since has not been, engaged in a bona fide operation in the transportation of a wide variety of commodities throughout the extensive territory embraced in its radial service; that its proof of actual operations varies widely from and does not support its claim of holding out to engage in a general-commodity operation in such territory, and that therefore such claim should be disregarded. **The bona fide operations herein found proven are those of a special type, using special equipment, and transport-**

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ing specific commodities or a class of commodities." (Emphasis added.)

A petition for reconsideration was filed, in which Appellant demanded further consideration, and in which petition it was pointed out that the conclusion of the Commission with respect to the "use" of a **"different type of equipment"** in the regular route operations as compared to the **type of equipment** used in the irregular-route operations, and the further conclusion of the Commission to the effect that the "equipment" used in the irregular route was of the "refrigerator type", and the further conclusion that the "use of (such) special equipment" resulted in a "self-imposed" commodity restriction, were simply "figments of imagination" of the drafter of the report. In this petition, the Appellant insisted that the record showed that all of its equipment was identical and that none of the equipment was of the "refrigerator type."[4]

This petition was granted and the Commission issued an order reopening the matter for further consideration on the record as previously submitted. Again the Appellant felt that its just claim would be recognized, in view of the fact that the basis for the Commission's decision of July 1, 1943, i. e., the "special equipment" angle, had been disposed of in Appellant's favor.

But, on January 6, 1945, a "Second Report on Reconsideration"[5] was served for the Commission, by Division V. In this report, the Appellant's future operations are subject to the **identical commodity restrictions** which were

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[4] The record is undisputed on this point. All of Appellant's equipment, as of June 1, 1935, was described as containing insulation, meaning that the inside of the trailers was lined with plywood, creating a smooth surface.

[5] This report (not printed "in full" in the Interstate Commerce Commission Reports) is an exhibit to the complaint filed in this cause and is the basis for this proceeding. It is reproduced in the Appendix hereto for the convenience of the Court.

imposed in the May 29, 1941, and the July 1, 1943, reports.[6] In this report, the Commission again states that its conclusions are in accordance with the standards you imposed in the **Carolina case.** No finding is there made to the effect that Appellant in its operations over irregular routes created "self-imposed" commodity restrictions, by the use of special "refrigerator type" equipment. Rather, the Commission attempts to justify this report upon "**minimization**" of the evidence offered in support of the claim as made by Appellant, and by the application of the very standards which you condemned in the **Carolina Case.** To accomplish this end, the Commission (a) "Atomizes" Appellant's "radial base" operation as of the "critical date", into

1. "**Nashville outbound operations,**" a division of the radial base. Then into shipments handled "**prior to June 1, 1935,**" and then into shipments handled "in 1935, after the statutory date." Then, into a comparison of **commodities handled prior to June 1, 1935, and in 1935 after that date. Then into "perishable" and "non-perishable"** commodities.[7]

2. By excluding from consideration all shipments handled which by their very nature must have been "non-perishable" by the fallacious conclusion (without an iota of record support) that such shipments will be presumed to have been **accommodation shipments** for . . . the companies for whom applicant transported perishable commodities."

3. "Operations from and to Murfreesboro," a part of the radial base. Proof of operations to and from Murfreesboro were then subjected to the same process of "atomization" as related with respect to "Nashville outbound operations."

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[6] Like the report of July 1, 1943, the Commission in this last report has omitted any statement of policy comparable to the condemned "Powell Bros. doctrine."

[7] Report of January 6, 1945, sheets 7 and 8.

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4. "Nashville inbound operations."[8] Then subjecting such operations to the "atomization" process by

(a) Dividing the proof into those shipments handled "prior to June 1, 1935," and "after the statutory date."

(b) Into operations between Nashville, on the one hand, and a particular state, on the other.

(c) By a consolidation of "items," which by their nature, would be included within a "general class of commodities," into a "generic classification" and then a consideration of the movement of such "generic classes" between Nashville, on the one hand, and a particular state, or a designated point within a state, on the other.[9]

(b) Thereafter applied a method of determination in reaching the required ultimate conclusion that was based, not upon the evidence of record, but rather upon inferences (that have no logical record basis), presumptions (based wholly upon facts not of record), and assertions of judicial knowledge (which we hereafter show to be no more than "half truths").

The Commission then concluded (Sheet 9 of Report of January 6, 1945):

"It is clear, therefore, that applicant restricted its inbound operations to the transportation of the respective commodities described and from the particular points and areas set forth above, and the grant of authority herein will be limited accordingly."

And, further (Sheet 10):

"Applicant's outbound and inbound irregular-route operations differ materially and they follow a

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8 Report January 6, 1945, Sheets 8 and 9.

9 By this we mean that the Commission arbitrarily grouped various items under a selected generic title. Thus, "fresh butter in tubs" is grouped with "powdered buttermilk" and other such items as "dairy products." Various items made from cotton are grouped and generically designated as "cotton factory products."

well-defined pattern which was determined by applicant's own action. The fact that applicant's inbound operations from Florida during the critical period differed from those from the other states and that its inbound and outbound operations differ is shown by the actual service rendered."

And, further (Sheet 10):

"It is a well known fact, of which we may take judicial notice, that Birmingham is an important iron and steel center; however, only one shipment of such commodities was transported from there prior, and one subsequent to the statutory date. There are also a number of well known and important ports, and industrial and distribution centers, such as Nashville, Birmingham, and Mobile, Ala., Augusta and Savannah, Ga., Jacksonville and Tampa, Fla., Charlotte, Raleigh and Wilmington, N. C., and Charleston and Columbia, S. C., included in the involved territory which ship and distribute a wide variety of commodities. However, only coffee was transported from Jacksonville, and sugar only from Savannah and Port Wentworth. Granite was shipped from only one point, Elberton, Ga., and no fruits and vegetables or peanuts originated in Alabama or Georgia prior to the statutory date although the record shows that the principal commodities moving from these two States to the Nashville area were sugar, peanuts, fruits and canned goods, and that Georgia has big marble quarries. Considering the points and territory served by applicant it is inconceivable that it was unable to secure shipments of more and varied commodities and that such commodities as sugar, coffee, and granite could not have been obtained from other points if it had endeavored to render a regular general-commodity operation."

Such conclusions are obviously reached in an effort to make the report consistent with the statements of policy set forth by the Court in the Carolina case, but based upon false premises, they constitute nothing but arbitrary find-

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ings. For instance, it should be apparent why "fruits, vegetables and peanuts" were not shown to have moved from "Alabama or Georgia prior to the statutory date" (March, April and May), as such crops would not have been harvested until after that date. Or, why "granite" doesn't move from a point where you do not find a quarry. Or why "sugar" doesn't move from points where refineries are not located. Or why "coffee" doesn't move from points except those points where large roasting plants are located.

Subsequent to the service of the Report of January 6, 1945, a petition for reconsideration was filed and denied by the Commission as a whole.

Thereafter, the present suit was begun by the filing of a complaint in the United States District Court for the Middle Division of Tennessee, Nashville Division, on the 27th day of August, 1945, and soon thereafter (November 23, 1945) presented to the statutory court. This case was kept under advisement for more than 7 months, and on the 8th day of July, 1946, the complaint was dismissed with the filing of a strong dissenting opinion by Judge Davies. For convenience, a copy of the findings of fact, conclusions of law, and the dissenting opinion in civil action No. 603, is incorporated in the appendix to this reply.

The effect of the Interstate Commerce Commission order of January 6, 1945, was to restrict Appellant's future irregular route radial operations to the transportation of:

(a) Packing house and dairy products, eggs and poultry from Nashville, Tennessee, to points in Georgia, North and South Carolina, and the described portions of Alabama and Florida.

(b) Dairy products, eggs and poultry, from Murfreesboro, Tennessee, to points in Georgia and the described portions of Florida.

(c) Cotton factory products from points in Georgia, North and South Carolina and the described portion of Alabama; canned and fresh fruits and vegetables,

and canned fruit juices, from the described portion of Florida; coffee, from Jacksonville; granite, from Elberton, Georgia; and sugar, from Port Wentworth and Savannah, to Nashville, Tennessee.

Thus the Commission, by the application of the arbitrary tests, has restricted Appellant's future operations to the strict pattern of its prior operation, and, as in the **Carolina case**, the Commission has,

1. Allowed Appellant to haul only certain specific commodities out of a larger list previously hauled, and

2. Does not permit Appellant to haul all of those specific commodities between all of the points in the authorized territory, but allows it to haul only certain commodities between given points.

3. It has refused to enlarge Appellant's radial base to include the metropolitan area surrounding Nashville.

In this connection, the Appellant, recognizing the trend of decisions with respect to the Commission's findings relating to geographical scope, does hereby state that it foregoes any further demand for a revision of the Commission's order with respect to the radial base, and we agree that Appellant's future irregular operations should be restricted, under the "grandfather" clause application to

Nashville and Murfreesboro, Tennessee, on the one hand, and points in Georgia, South and North Carolina, and the designated portions of Alabama and Florida, on the other.

This further concession upon the part of Appellant eliminates entirely any question with respect to geographical scope, and presents squarely the question of the propriety of the commodity restrictions under the record as made, and the decisions of this court as rendered in the **Carolina** and **Howard Hall cases.**

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APPELLEES' CONTENTIONS.

As stated, the motion as filed does not appear to attack the jurisdiction of the Supreme Court to review the decision of the District Court.

The motion does assert that the appeal presents no "substantial question," and that the decree of the District Court should be affirmed without argument.[1]

Appellees' assertion of a lack of a substantial federal question[2] seems to be based upon three points, namely:

1. That the decision of the District Court in **W. H. Tompkins v. United States et al.**, Civil Action No. 258, is not res judicata of the issues here involved.[3]

2. That "the precise scope of the operating authority to be granted to a motor carrier making application under the 'grandfather clause' is for the Commission to determine upon the evidence of record."[4] That in such determination the Commission may apply such rules as it deems appropriate.

3. That Appellant voluntarily imposed restrictions on its operations, as of the critical date, to the extent that it would only transport particular items of a "perishable nature" outbound from its radial base, and specific items inbound from designated points in its determined territory, such service as rendered consisting of a "specialized service."

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1 See pages 3 and 11 of Motion to Affirm.

2 We have eliminated the question with respect to the geographical scope, and we treat only those questions raised as they relate to the commodity restrictions.

3 Pages 3, 4 and 5 of Motion.

4 Pages 5, etc., of Motion.

APPELLANT'S CONTENTIONS.

While we intend to discuss the three contentions of the appellees upon which the motion is based in our argument and brief, it should suffice here to say that we emphatically deny that the Commission in its decision of January 6, 1945, has complied with the standards which this court prescribed in its decision in the **Carolina** and **Howard Hall Company cases**. While it is true that the Commission has eliminated from its report of July 1, 1943, and January 6, 1945, that language (similar to that found in the Commission's first reports on the Carolina and Hall Company cases), generally referred to as the "Powell Bros. doctrine," which was found to be so objectionable to this Court, as shown in your decisions on the **Carolina** and **Hall Company cases**, we insist that the standards applied by the Commission in both the July 1, 1943, and the January 6, 1945, decisions, are even more objectionable, unfair, and inequitable than those found to have been applied in the cited cases, which were remanded to the Commission. Counsel for the Interstate Commerce Commission at the time of the presentation of the two cases to the District Court indicated the Commission's position to the effect that the Court's decisions in the **Carolina** and **Howard Hall Company cases** needed "clarification." The tenor of the Commission's reports of July 1, 1943 and January 6, 1945, indicates the preparation of a "test case", the defense to which the appellant must be put.

Affirmatively, the appellant seeks to set aside the Interstate Commerce Commission's order of January 6, 1945, because it sincerely believes that this decision was arrived at by the Commission by the application of improper standards and by the application of standards specifically disapproved by this Court in the **Carolina** and **Howard Hall Company cases**. Specifically, we say that the Com-

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mission erred in its generic grouping of the items transported so as to make it appear that only a few "items" of a general class of commodities was transported which would justify its conclusion that the applicant by "self-imposed restrictions" limited its operation as of the critical date to "special commodities". Further, that the Commission erred in eliminating from consideration those items transported which would not "fit" into the generic grouping by tagging such shipments as "accommodation shipments" without the benefit of a single word of record justification. Still further, that the Commission erred by reason of the fact that it indulged in inferences, assumptions, and conclusions, all without a semblance of record support, upon which it based its findings that the applicant had by "self-imposed restrictions" limited its operation between specific points to the particular item shown by the record to have been transported during a selected arbitrary period. That, still further, the Commission erred in the methods used in reaching its ultimate conclusion in that it "atomized" and "pulverized" applicant's proof of operation into a number of arbitrarily selected segments, and then further applying the process of division, divided those segments, so arbitrarily selected, into arbitrarily selected time periods for the purpose of justifying its conclusion that appellant voluntarily imposed a restriction on its grandfather clause operation of the particluar items shown to have been transported between the specified points in which those items had been transported. The effect of this method of treatment is to view appellant's irregular route operation, **not as one radial operation, but as a number of arbitrarily selected non-radial services.**

The district court erred in not sustaining appellant's bill of complaint in that the Commission erred in:

1. Restricting appellant's future operations out-

bound from Murfreesboro, a part of the claimed radial base, to dairy products, eggs and poultry, to a portion of the territory (Georgia and Florida) and in restricting appellant's future operations outbound from Nashville, a part of the determined radial base, to packing house and dairy products, eggs and poultry when as a matter of fact the record shows the handling of numerous and different items, all of which are included in a general class of commodities.

2. In restricting appellant's future inbound operations to Nashville, only, and then further restricting appellant's inbound operation, to particluar commodities from particularly designated territories or prescribed points, when, in fact, the record discloses the handling of numerous and varied items, all of which are included within a general class of commodities, and all of which were transported from all points in the defined territory as offered for shipment.

3. In finding that the actual items transported were not sufficiently "varied", so as to justify the conclusion that the appellant was engaged in the transportation of a general class of commodity.

4. In finding that the fact that a particular item was transported from a particular point, within the determined territory, was, in itself, evidence of a "self-imposed restriction" so as to justify the restriction of appellant's future operations to the identical strict pattern indicated by its actual operation on the critical date.

5. In that the Commission in its consideration of appellant's proof of operation refused to consider the irregular route operation as a whole, but, on the contrary, atomized and pulverized such proof of operation into a number of arbitrarily selected component parts.

6. In that the Commission eliminated from consideration those shipments which by their nature did not fall into the Commission's predetermined generic

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grouping by terming such shipments "accommodation shipments", when in fact no basis of record is found justifying such action.

7. In eliminating from consideration all uncontradicted oral testimony, adduced in support of the application, and basing its decision solely, upon the documentary proof, after such proof had been subjected to a system of "generic grouping", and the elimination of other shipments upon the fallacious conclusion that such shipments were "accommodation" or of a sporadic or "contra-pattern" nature.

8. In requiring appellant to make a greater showing in the number of items transported in irregular route service, than it requires in the showing made in a regular route service.

The District Court further erred in not finding and in not concluding that its action in the case of **W. H. Tompkins Company v. United States**, Civil Action 258, was res adjudicata, of the determination of the issues here involved.

ARGUMENT AND BRIEF.

We emphatically state that a substantial federal question is here involved, which question is raised, not only by the contentions advanced by the appellees, but directly by appellant's assignments of error. If, in fact, the Court's decision in the **Carolina Case** need "clarification" that is another reason for the disposition of the case on its merits. We do not here consider it necessary to argue the merits of appellant's asserted claims of a presumptive right to a certificate of convenience and necessity under the provisions of part 2 of the Interstate Commerce Act, except in so far as those claims, and the evidence introduced before the Commission in support of those claims, affect our contention that a substantial question is presented, and that the District Court erred in dismissing our complaint to set aside the Commission's order of January 6, 1945.

We first propose to discuss the contentions which the appellees rely upon, in their motion, to the effect that you should sustain and affirm the decision of the District Court.

Was the Action of the District Court in Civil Action 258 Res Adjudicata of the Issues Here Involved?

While we believe that this question must be answered in the affirmative, we say that to our mind this phase of the case is secondary because, after all, if this appellant is ever to secure the right to continue a business it has conducted for many years, it appears that only an affirmative directive from this court to the Commission will effect that result. That, irrespective of your determination of this issue, and its effect upon the question of whether or not a substantial question is here involved, that you must nevertheless dispose of this case, on its merits, in view of the contentions raised and the property rights involved.

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In Civil Action 258, brought in the United States District Court for the Middle Division of Tennessee, Nashville Division, the W. H. Tompkins Company, now Tompkins Motor Lines, Inc., the identical appellant here, sought to set aside the report of the Interstate Commerce Commission in Docket MC 20783, under date of May 29, 1941. The defendants, in Civil Action 258, were the United States of America, and the Interstate Commerce Commission, the identical appellees here.

The **cause of action in Civil Docket 258**, arose out of the Commission's decision on the matter of the application of the W. H. Tompkins Company, filed on January 11, 1936. That application asserted presumptive rights to a certificate of convenience and necessity under the provisions of Section 206 (A) of the Motor Carrier Act. The **cause of action in the present suit** arose by reason of the filing of that **same application** which was involved in Civil Action 258. In other words, the Commission's decisions of May 29, 1941, July 1, 1943, and January 6, 1945 were all issued in a determination of the rights accruing to this appellant by reason of the filing of the same application, provided for, in the same statute. Further, it should be apparent that only one right to a certificate accrued to appellant, and **that right** is the **right which was in issue** in Civil Action 258 and **is in issue** in this action.

Further, it must be remembered in a disposition of this issue that the **record of the proceedings before the Commission** presented in Civil Action No. 258, is identical with that presented in the instant case, in that the Interstate Commerce Commission, subsequent to the Court's decision in Civil Action 258, did not reopen the record for further proceedings but simply reconsidered the matter on the record as originally made.

The Court, in Civil Action 258, in its findings of fact, said:

"(2) It limited plaintiff's operations to the transportation of certain specific items of a general class of property.

(3) It permitted plaintiff to transport certain items between designated points and parts of the area in which the Commission found that the plaintiff had conducted its operations."

In its order, the Court ordered

"(3) That this cause be remanded to the Interstate Commerce Commission for **basic and essential findings as required and pointed out** in the United States of America, and the Interstate Commerce Commission, Appellants, v. Carolina Freight Carriers Corporation, and in Howard Hall Company, Inc., Appellant, v. United States of America and Interstate Commerce Commission, both of which cases were decided by the Supreme Court on March 2, 1942." (Emphasis added.)

The order of the Court, in Civil Action 258, was not appealed from by the Government, and the order there entered apparently was the law with respect to the matter in issue. We maintain that the action of the Court in Civil Action 258, is entirely res adjudicata of the issues here presented.

The appellees in their motion to affirm maintain that,

"The mere fact that the same parties are involved in a second suit in the same court would not make the rule of res adjudicata applicable to a separate, subsequent order of the Commission, any more than that rule would be applicable in a second court action by appellant against the Railroad Company for damages arising out of a second collision between the railroad company's trains and appellant's trucks.[1]"

Further, the appellees say that,

1 See page 4 of Motion.

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"The District Court's decision of July 7, 1942, did not prescribe what result the Commission should reach on properly applying the appropriate legal standard in passing upon appellant's application." [2]

In answer to appellees' first contention, we point out that the situation here presented is entirely different from that which would be presented in two court actions by the same plaintiff against the same railroad company for damages arising out of **two separate collisions**. Obviously, in such a situation, **two separate and distinct causes of action** would arise and both might be properly maintained, in a single court in separate proceedings between the same parties. In the issue here presented, a single cause of action exists which cause of action was determined in appellant's favor in Civil Action 258.

In response to the second contention raised by appellees, we point out that the findings of fact and conclusions of law rendered by the Court in Civil Action 258 condemned those conclusions of the Commission which limited appellant's operation to the transportation of "specific items of a general class of property", and which limited appellant's future operation to the transportation of "certain items between designated points and parts of the area in which the Commission found that the appellant had conducted its operation." Further, we point out that the action of the Court remanded the case to the Commission for the application of **those standards** heretofore set out by this Court in the Carolina and Hall Company cases, which the court found would result in the elimination of the unlawful restrictions. Certainly, the effect of the Court's order did not contemplate merely the deletion of that statement of policy[3] included in the May 29, 1941 report, which had been condemned by this Court in the **Carolina and Hall Company cases**, which indicated the

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[2] See Motion, page 4.

[3] Generally referred to as the "Powell Bros. doctrine."

application of a different and stricter test, for applications involving irregular route transportation than that for regular route transportation. The theory of the Government in this respect is fundamental. It is their position that by your action in the **Carolina and Howard Hall Company cases**, and by the action of this Court in Civil Action 258, it was **simply found** that the Commission had **merely** failed to put together, in a technical sense, the words necessary to qualify the order with respect to "basic and essential findings".

On the other hand, it is our position that in your decision in the **Carolina and Hall Company cases** you definitely, in a clear and concise manner, stated certain standards which must be applied in the disposition of irregular route common carrier grandfather clause applications involving the transportation of a general class of commodities. That the Court in Civil Action 258 simply applied to the proceeding before it, the same rule for the application of standards, that you proposed in the two cases mentioned.

We say, in this case, that the test applicable to a determination of whether or not the doctrine of res adjudicata should be applied is here met.

This test is stated in 30 American Jurisprudence, Judgments, Section 174, as follows:

> "In the application of the doctrine of res judicata, if it is doubtful whether a section action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action."

Likewise, in 30 Corpus Juris, Judgments, Section 1154, this test is expressed as follows:

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"To make a former judgment a bar to the maintenance of a present suit, it must have been rendered in an action between the same parties, or between those in privy with them, and there must be identity of the quality in the persons in or for whom the claim is made, or in other words, identity of the parties in the character in which they are litigants."

The doctrine of res judicata is defined in 34 Corpus Juris, Judgment, Section 1154, in the following terms:

"The doctrine of res judicata first definitely formulated in the Duchess of Kingston's Case, embodies two main rules, which may be stated as follows:

"(1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in the determination of an action before a competent Court, in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein, and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not."

In the same work under the same heading in Section 1282, this rule is again stated as follows:

"A fact or question was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction is conclusively settled by the judgment herein, so far as concerns the parties to the action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction, upon either the same or a different cause of action."

It has been firmly established that this doctrine is applicable in our Federal Courts.

In the case of **Oklahoma v. Texas**, 256 U. S. 70, at page 85, the Supreme Court made this clear when it said:

> "The general principle applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48-49, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action."

And even though this doctrine is ordinarily regarded as a defense, it is equally available to the appellant in this case.

Authority for this statement is found in 34 Corpus Juris, Judgments, Section 1160, where it is stated:

> "While the doctrine of res judicata is usually regarded as a defense, it is equally available to plaintiff where the circumstances warrant it, either by pleading it as an element of his cause of action, or in reply to defendant's answer, or where no opportunity for this is afforded, by introducing evidence of the former adjudication."

The application of this doctrine in the instant case simply means that any issues, either of law or fact, which were determined by the Court in Civil Action No. 258 are binding on the parties here, and the appellees cannot here relitigate those matters.

By its order in cause No. 258, the Court directed the

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Interstate Commerce Commission, in disposing of appellant's application, to **make the basic and essential findings as required and pointed out in the Carolina and Hall cases.** Thus one of the matters between the parties hereto, that was judicially determined in cause No. 258, was that the Commission shall decide the application before it, and here involved, in accordance with the principles announced in those two cases.

In addition, this Court by its findings Nos. 5 (2) and (3) judicially determined that the Commission limited appellant's operations to the transportation of specific items of a general class of property, and allowed appellant to transport only certain items, only between certain designated points and parts of the area in which the Commission found that appellant had conducted its operations, and since that order was set aside and enjoined, the Court judicially determined, upon the evidence before it, that such commodity limitations were violative of the principles announced in the **Carolina and Hall cases.**

The issues before the Court in the instant case are the same as those in cause No. 258, since the Commission has not in its report of January 6, 1945, made the findings, "as required and pointed out" in the **Carolina and Hall Company cases**, and neither has it followed the principles there announced. Nor can it be said that the Commission has complied with the order of the Court.

It is true that the Commission quoted etxensively from the **Carolina case** in its order of January 6, 1945, and in addition said that it had applied the tests as announced in that case (Sheet 10 of the Report), but such is not the case. The findings in the report make it self-evident that the tests and principles of this case were not applied.

In the first instance one of the rules as enunciated in the **Carlina case** is:

"If the applicant had established that it was a

'common carrier' for a group of commodities or for an entire class of or classes of property and was in 'bona fide operation' during the critical periods in a specified territory restrictions on commodities which could be moved in any one direction or between designated points would not be justified."

The Commission found that appellant was a "common carrier," and further found that it was on the critical date transporting items of a general class of property in the territory, but then, in direct contravention of this rule, and the mandate of this Court, it proceeded to limit the transportation of these classes of property to movements in only one direction.

Further the **Carolina case** states as another standard that if the applicant did establish that it was a "common carrier" only of a limited number of commodities, there would normally be no statutory sanction for limiting the carriage of particular commodities in that group to specified points in the authorized area.

The Commission found that appellant was a "common carrier" of a limited number of commodities, but then, contrary to this standard as announced in the Carolina case, it limited the carriage of these commodities to a few points in the area.

The Commission, by limiting the transportation of specific commodities to or from certain points in the territory did not follow another rule laid down in the **Carolina case**. The Supreme Court there said:

"Once the common carrier status of appellee had been established as respects those commodities, shipments, to any part of the authorized territory or to any of the authorized points therein should have been permitted, in absence of evidence that appellee as respects carriage between specified points had restricted its undertaking to particular commodities."

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There is no evidence in this record that plaintiff restricted its operations to a pattern as authorized by the Commission. All of the evidence of record points to the contrary. The determination of the Commission that it did so restrict its operations is based solely on inference supposition and theory, and on the evidence as to commodities actually transported. To so restrict appellant's operation is to do just what the Supreme Court in the **Carolina case** condemned, when it said:

> "For there is no evidence in this case that it had restricted its undertakings as respects beer to shipments from Newark, unless the fact that it had carried beer only from that point is to be conclusive. But to say that that was conclusive or controlling would be to disregard the natural and normal course of business shown by this record."

Therefore, when the Commission concluded from the transportation actually performed by appellant that appellant restricted its operation to the commodithies actually transported, to and from the points served with the transportation of these commodities, it clearly failed to recognize this rule of the case, as this Court has directed it to do.

In determining this application the Commission granted appellant authority to transport only the commodities which it had previously transported, to and from the precise points where evidence of transportation was shown. In other words, it "froze" appellant's "future" operations to the precise pattern of its "prior" operation.

Thereby again the Commission failed to follow the mandate of this Court.

In the **Carolina case** it was held that:

> "But where it was actively soliciting whatever it could get at any of the points, it does violence to its Common Carrier status to make the origin or destination of future shipments conform to the precise pattern of the old."

The undisputed oral testimony in this record shows that appellant hauled anything it could get, to and from any points, within the territory, in which its operations were conducted. Under the above quoted rule the Commission should have viewed the operation liberally and not pared it down to the very bones of operations actually performed. The Commission should have treated this case as the Supreme Court in the **Carolina case** says it should when it said:

> "For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in the national transportation system."

No attitude of liberality has been shown by the Commission in dealing with this application. It has not granted appellant one iota of authority for which it did not prove service beyond a shadow of a doubt. On the other hand, by terming some shipments "accommodation shipments," it has prohibited the future handling of the items so involved. Certainly it cannot be said that the Commission has followed the **Carolina case** in this particular.

Furthermore, the Court in its findings Nos. 5 (2) and (3) in Civil Action 258, pointed out that the Commission limited appellant's operations to the transportation of certain specific items of a general class of property and permitted it to transport certain items between designated points and parts of the area in which the Commission found that appellant had conducted operations.

The rules laid down in the Carolina case are that once the "Common Carrier" status of an applicant of a class or classes of property has been determined, no restrictions should be placed on the commodities of that class which could be moved in any direction or between any points, and a restriction limiting carriage of particular commodities to specified points is unwarranted, and transportation

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of shipments to any part of the territory should be authorized, in the absence of a showing **of record** of voluntary "self-imposed" restrictions.

We therefore say that the Court, by its said findings, has judicially determined that the commodity restrictions included in the July 31, 1943 report are not in accord with the rules announced in the Carolina case, but on the other hand are contrary to the principles pointed out in that case. The Court has held that this Commission cannot under the **Carolina case** impose on this applicant the "point to point" and "commodity restrictions" contained in the report under review in Cause No. 258.

In its report of January 6, 1945, the Commission granted appellant the identical authority, with the identical restrictions, as contained in the report and order heretofore set aside by the Court.

The only difference in the last and first report is that the Commission has used a different basis in analyzing the evidence. It has reached the identical result as it did in its prior report.

If the Commission has followed the principles of the **Carolina case**, as the Court directed it to do, it would have reached a different result, as the Court indicated it should, in a proper application of the standards prescribed.

A study of the report here involved shows that the Commission has not in any way complied with the directions of the Court. We are back in this Court with the same case we had in Cause No. 258, except with a slightly more elaborate and different report.

We respectfully submit that in its report of January 6, 1945, the Commission has done nothing to comply with the Court's order in this case. The matter still stands where it was immediately after the entry of the Court's order. We therefore urge that it should be held that the Court's order of July 7, 1942 in Cause No. 258 is res judicata of the issues involved here, and that this Court

should set aside the order of the Commission under date January 6, 1945, as the Court did the order involved in Cause No. 258.

The Court, in Cause No. 258, said that the principles of the Carolina case should entitle appellant to a grant of authority without the restrictions heretofore imposed by the Commission. The very purpose of the doctrine of res judicata is to put an end to litigation. If this Court permits the Commission to continue to repeatedly grant to applicant the same authority with the same restrictions this litigation will never be ended and rights guaranteed to Complainant by Congress will be dissipated.

The position here taken by the Government is directly opposite to that position taken by the Government in Howard Hall Company, Inc., v. United States et al. (October term, 1945), No. 627, wherein it was insisted that the prior court proceedings (315 U. S. 495) were res judicata to the issue with respect to geographical scope there presented. In fact, in that case the District Court found at the Government's insistence that the doctrine of res judicata applied and dismissed complainant's bill, despite the fact that the record before the District Court in the latter case contained 200 more pages and 20 additional exhibits in excess of the record presented to the Supreme Court as the Commission had reopened that proceeding for further hearing. This point does present a substantial question.

The Commodity Restrictions Imposed in the Commission's Order of January 6, 1945, Are Not Justified on the Record, Submitted to the Commission, Under the Standards Prescribed by This Court in the Carolina and Howard Hall Company Cases.

For the sake of brevity, we shall attempt to answer appellee's further contentions under this one heading.

In the beginning, let us say that in a given case we

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would have no fault to find with the argument which counsel advanced in their motion as justification for the imposition of commodity restrictions. Further, let us point out, that the arguments so advanced by counsel in the motion go much further than the findings made by the Commission in its order in support of the commodity restrictions. But, we say that the "given case", where commodity limitations could be justified, by the arguments advanced, is an entirely different case than that presented by this appellant on this record.

We readily admit that the decision in this case shall be controlled by this Court's decision in the Carolina Carriers and the Howard Hall Company cases, in fact, we insist that this is so, but we emphatically disagree with the Commission's interpretation of this Court's decision in those cases. It is evident, from the motion filed in this case, that the Commission considers the effect of the Carolina case to be that such matter was remanded to it solely because of a **technical omission** in the wording of its findings. On the other hand we insist that by your decision in those cases you intended to set up certain standards by which you insist that grandfather clause applications be determined. Further, in your decisions on those cases, you stated the intent of Congress to be that there would be assured to grandfather clause applicants a substantial parity in their future operations, as compared to those "bona fide" operations conducted on the critical date. We take it from your decisions in those cases that you would not sanction the use of any test which results in a "patent denial" of that "substantial parity" between "future operations and prior bona fide operations" which the Act contemplates and which Congress intended to be a "grant of rights" to carriers such as appellant.

The method used by the Commission in a determination

of this case definitely violates, in our opinion, both the letter and the spirit of your decision in the **Carolina and Hall Cases.**

Remembering that the sole issue now involved relates to the commodity limitation, and that we accept, without question,

1. The finding that Nashville and Murfreesboro constitute the defined radial base, and that Georgia, North and South Carolina and the described portions of Alabama and Florida constitute the defined radial territory, and,

2. That the type of operation conducted was a radial one, and,

3. The appellant is a common carrier operating over irregular routes, and,

4. That each and every item transported during the critical period was an item which can be transported by a "general commodity hauler" and is an item which would be included within a "general class of commodities", and is an item which does not require the use of "special equipment".

We will attempt to analyze the Commission's decision and to point out those errors which we believe raise a substantial federal question.

Appellant contends that it is entitled to continue its regular route operation between Nashville and Atlanta, as quoted, and in addition that it should be entitled to transport

General commodities, over irregular routes,

> Between Nashville and Murfreesboro, on the one hand, and all points and places in Georgia, North and South Carolina and the specified territory in Florida and Alabama, on the other.

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There are certain facts, included in the Commission's findings,[1] which are not in dispute, and they may be stated as follows:

"Applicant was incorporated on February 27, 1935, to take over the trucking business and operating rights of W. H. Tompkins, an individual, hereinafter called "Tompkins" (Sheet No. 3).

* * * * * * *

"On February 27, 1935, applicant's predecessor owned four trucks and leased about six others, and on June 1, 1935, applicant owned five trucks and leased eight other trucks. All of applicant's trucks, except one pick-up truck used in Atlanta, were of the usual van type, to which insulation material has been added to the bodies for the protection of perishable commodities requiring refrigeration" (Sheet No. 3).

* * * * * * *

"As previously stated, applicant applied for two separate and different operations, one a regular and the other an irregular-route operation. A review of the record discloses that in its regular-route operation it transported a variety of unrelated commodities and that its trucks were operated daily, except Saturday, regardless of the tonnage available, on fixed schedules, over a designated highway, and between fixed termini. In this operation freight that originated at, or was destined to, points beyond Nashville and Atlanta was interchanged at those points with other carriers. Its irregular-route operations, outbound, as will hereinafter be seen, consisted principally of perishable commodities, and such operations are in the nature of call-and-demand service. In these operations applicant attempted to secure truckload shipments and usually, but not always, loaded the truck practically to full capacity. On the trips from Nashville shipments have been solicited from several shippers and combined

[1] The Report of January 6, 1945, is reproduced, sheet by sheet, for your convenience, in the Appendix. This Report is not printed "in full" in the I. C. C. Reports.

into truckloads for transportation to points located in the same general territory in one of the aforementioned States on certain days of the week. Return loads consisted of commodities picked up at or near delivery points of outbound shipments" (Sheet No. 5).

• • • • • • •

"The evidence adduced on behalf of applicant included the testimony of its manager, who has been employed by applicant and its predecessor since February 1, 1935, applicant's only witness, and abstracts listing the shipments transported by it during the representative periods of March, April, May, June and July of the years 1935, 1936 and 1937. The abstracts cover the bulk, if not all, of the shipments transported during these months and are representative of those transported during the other periods of the respective years" (Sheets Nos. 5 and 6).

• • • • • • •

"No shipments are shown prior to March, 1935, because applicant was only incorporated on February 27, 1935, and its predecessors kept no permanent records" (prior to that time). (Sheet No. 6.)

• • • • • • •

The record submitted to the Commission contains other important, relevant, uncontradicted evidence, which must be considered in the disposition of this case which, for convenience, we abstract as follows:[2]

That the applicant has always offered refrigerator service over its regular as well as irregular routes, and has used equipment that has been insulated, and which can transport perishable as well as non-perishable products (Tr. 9).

• • • • • • •

That on its irregular operations the applicant has handled and solicited every class of commodities that

2 The testimony abstracted will be found in the transcript of the Commission's proceedings (Exhibit No. 1 to the record in this case) on the pages indicated and is made from the testimony of Mr. Harrington, the only witness presented.

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regularly moved in the territory. That in the nature of things the movement of commodities changes from season to season, and in the same way the direction or flow of commodities changes from time to time (Tr. 11).

• • • • • • •

That in the regular course of its business they have accepted various commodities from new industries that have been inaugurated in its various territories during the entire time of its corporate existence (Tr. 11).

• • • • • • •

That the applicant has always accepted freight from the public generally, when offered, and when they were able to secure it through solicitation, and they have never operated under any contract for any shipper (Tr. 11).

• • • • • • •

That from time to time the applicant has supplemented its own equipment with equipment which it had leased, but that in those cases it has supervised, controlled and operated such leased equipment in the same manner that it operated its own trucks (Tr. 11).

• • • • • • •

That the so-called refrigerator trucks are so constructed that they are also just as well suited to handling of unrefrigerated products (Tr. 24).

• • • • • • •

That the applicant, like any other carrier, likes to have its trucks loaded, and on its irregular operations attempts to secure sufficient tonnage to load its trucks by soliciting freight from its various customers (Tr. 25-26).

• • • • • • •

That in the past the applicant has had to make trips over its irregular routes with its trucks not loaded to capacity. That if its customers have shipments destined into the territory where the appli-

cant's irregular operations are conducted the applicant explains to the shipper that they can handle the proffered shipment on the next truck going directly into the irregular route territory, or that they can take it over their regular route operation to Atlanta, Georgia, and then interline it with some carrier serving the particular territory from Atlanta (Tr. 27). That on occasion the applicant has sent its trucks into the Carolinas empty, in order to bring back loads of freight from the Carolinas (Tr. 28). That the applicant has never conducted its business under contracts with any shipper, and has never had any contracts with any shipper calling for the transportation of freight (Tr. 35). That the principal commodities moving westward from the Carolinas consist of the various cotton products, and the principal commodities moving northward from Florida consist of coffee, vegetables, sugar, fruit, fruit juices, canned fruit and vegetables (Tr. 41-42).

• • • • • • •

That the applicant's operation has been conducted in Florida since the date of its incorporation, and that it has held itself out as a common carrier to accept commodities generally, and actually handled any and all commodities offered to it (Tr. 48).

• • • • • • •

That the applicant's trucks were the usual van type body, with insulation in the sides and top, and that they were similar in appearance and size to the ordinary freight trucks (Tr. 59-60).

• • • • • • •

That the applicant operates over irregular routes, ordinarily on regular days, and that the shippers are acquainted with the service and ordinarily offer the applicant shipments for transportation on those days when the trucks regularly move on the irregular routes, and that this has been the manner in which the applicant's business has been conducted since the witness first became connected with it, in February

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of 1935 (Tr. 60). That when a truck is destined over the irregular operation into North Carolina, that they place on that truck all shipments to intermediate points as well as points contiguous and adjacent to the final destinations (Tr. 61). That the applicant handles all commodities moving regularly from Nashville into their irregular route territories, with the exception of stoves, which they have often solicited, but never been able to secure (Tr. 61). That the principal commodities moving from Alabama and Georgia into Nashville and its vicinity are sugar, peanuts, fruit, cotton piece goods and related products (Tr. 61). That the principal commodities moving from Alabama and Georgia into Nashville and its vicinity are sugar, peanuts, fruit, cotton piece goods, granite and canned goods, and that the applicant regularly handles all of those commodities (Tr. 61-62).

* * * * * * *

The record from which the testimony was abstracted was made before an Examiner who was permanently stationed at Nashville, Tennessee and who had heard the cases of most of the motor carriers domiciled in Tennessee and of course was familiar with the movement of traffic, the nature of the commodities, and the general conditions surrounding motor carriers in the territory during the time periods involved. The transcript indicates the Examiner's active participation in the development of the record. Further, the record shows the active, hostile and adverse participation of eminent, learned and experienced counsel representing affected railroad and motor carrier protestants, all of whom took active part in the development of the record submitted.

Yet the testimony of Mr. Harrington, abstracted above, is uncontradicted and under the circumstances must be accepted at its face value.

The above comment is occasioned, solely, because of the unusual, violent (and almost personal) attack made upon

the credibility of this witness's testimony by government counsel.[3] Such attack, under the circumstances, may be considered justified only because, the "essential and basic findings", made and necessary to support the order, fall of their own weight (otherwise based upon false promises), unless this uncontradicted testimony of Mr. Harrington is discredited.

The Commission in its order of January 6, 1945 interprets the application of the **Carolina Case** standards to this case (insofar as commodity restrictions are concerned) as follows:

> "• • • the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and **prior** bona fide operations'" (Sheet 4, January 6, 1945 Report).
>
> "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities. • • • Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. • • • The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in 'bona fide operation' as a 'common carrier' of the group of commodities or of the class or classes of property during the periods in question" (Sheet 4, January 6, 1945 Report).
>
> "• • • an applicant's status may vary from one part of the territory to another or be different in the northbound shipments than in southbound shipments" (Sheet 4, January 6, 1945 Report).

[3] See page 11 of Motion. It is inconceivable that counsel would specify isolated pages 36 and 38 (of transcript) as justification for the attack made when even a baby could tell from a glance that the discussion cited continues without interruption from pages 36 to 45.

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The Commission fails to notice, recognize or apply your further statements of standards, as set out below:

"If the applicant has established that it was a 'common carrier' for a group of commodities or for an entire class or classes of property and was in 'bona fide operation' during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. The fact that a particular commodity had never been transported between certain points in that territory would not mean that authority to haul it between them should be witheld" (315 U. S. 486).

"Likewise, if the applicant could establish that it was a 'common carrier' only of a limited number of commodities, there would normally be no statutory sanction for limiting the carriage of particular commodities in that group to specified points in the authorized area" (315 U. S. 486).

"Presumptively one who had established his status of 'common carrier' would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipments of any articles were authorized" (315 U. S. 486).

"Once the common carrier status of appellee had been established as respects those commodities, shipments to any parts of the authorized territory, or to any of the authorized points therein, would have been permitted in absence of evidence that the appellee as respects carriage between specified points and restricted its undertaking to particular commodities" (315 U. S. 487).

"But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure" (315 U. S. 488).

"Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither we nor the Commission is warranted in departing from those standards because of any doubt which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command'. Opp. Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence" (315 U. S. 489).

"The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet viewed as a whole rather than as a group of separate and un-

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related items, his prior activities may satisfy the test of 'bona fide operation' as a 'common carrier' within the scope of his holding out. The fact that some of the articles may have been carried before but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking. But it does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class. That is to say, he may have been a common carrier of a large group of general commodities or of an entire class of property both before and after the critical date though the specific commodities carried varied considerably. The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in 'bona fide operation' as a 'common carrier' of the group of commodities or of the class or classes of property during the periods in question" (315 U. S. 483, 484).

"On the other hand, if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before. And where he has carried a wide variety of general commodities, he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than the others" (315 U. S. 483).

If the Commission is correct in its theory that the only requirement with which it must comply are those first stated above, and that your clear cogent statements, last stated above, may be ignored and disregarded, then we too, agree, that your decision needs "clarification" and that it is not the "statutory safeguard" or the "magna charter" of that large segment of the trucking industry, the members of whom, like the appellant, have felt that

since March 2, 1942, that their life work would be protected, preserved and continued in public service.

The Commission's report violates almost each and every principle stated just above. Let us consider the application of those principles, in the order stated, with the action by the Commission.

First, the "group of commodities" actually handled within the specified territory, are all includable in a general class of commodities. Yet the Commission does **restrict** the future movement of these commodities to that in "one direction", i. e. "outbound Nashville" and "inbound Nashville". Further, the Commission does **restrict** the future movement to that of a "particular commodity" between "designated points", i. e., "coffee from Jacksonville, Florida". It urges the fact that a "particular commodity" has never been transported from a particular point as justification for the imposition of the commodity restrictions in direct contradiction to your mandate.[4]

Secondly, if it were justifiably found that appellant's operation had been restricted to a "limited number of commodities". The principles stated in your decision are further ignored because the Commission, without "statutory sanction" has limited the movements of a "specified commodity" between "specified points" within the authorized area".[5]

Thirdly, it has been found that appellant is a common carrier and it has been found that appellant was engaged in the handling of certain commodities within a determined area of "undertaking," yet the commodity restrictions imposed prohibit the future handling of "those commodities" ("embraced in its undertaking") "to all points to which any shipments of any articles were authorized."

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4 See sheet 10 of report of January 6, 1945.

5 See sheet 10 of report, i. e., "granite from Elberton."

Thus, not only is your stated "presumption" ignored, **but in fact a presumption to the contrary is advanced.**[6]

Fourthly, there is a total lack of "evidence" IN THE RECORD to the effect that the appellee has voluntarily, or otherwise, "restricted its undertaking" to the handling of "specific commodities" between "designated points." In fact, the record discloses an uncontradicted statement directly to the opposite effect by the only witness offered by either the applicant or protestants.[7]

The Commission would substitute "presumptions," "inferences," "fallacious conclusions," and "judicial knowledge," for the "evidence" which you have said **would be required.**[8]

Fifthly, the record discloses a full and complete solicitation of all available traffic. In fact, the record shows shipments, of a general class, handled during the period May to July, 1935, inclusive, which will cover almost every conceivable item, of that class, which would move in volume, within the "natural and normal" course of business, considering the seasonal coverage. Yet the Commission would, and does, "freeze" the future operation into the **exact and identical pattern** disclosed by the picture of **representative shipments** as placed in evidence. Yet you have said there is no STATUTORY SANCTION which would permit such "pulverization."

Sixthly, while you have fully repudiated the so-called **Powell Bros. Doctrine**, and while the Commission has eliminated the condemned wording from both the July 1, 1943, and the January 6, 1945, reports, the course of conduct (as shown by the tenor of the two reports) indicates an acceptance of stated principles only by way of "lip-

[6] See sheet 10 of report.

[7] See transcript of evidence before Commission, page 11. This transcript is a part of Exhibit 1 in the proceeding.

[8] See sheet 10 of Report of January 6, 1945.

service." Never in our practice before the Commission have we seen such a determined effort made to support a desired conclusion. These reports do not indicate the usual "reasonable judicial determination," but it might rather be compared to the continued effort of a Public Prosecutor to secure a conviction in the face of a series of verdicts involving "hung juries." And the same result may well occur here, as this appellee cannot much longer bear the cost of ten years of litigation in establishing its "presumptive grandfather clause claim" to the "grant of rights" which you have said Congress **intended** to give to carriers such as appellee. No, the report of January 6, 1945, is still the "hand of Esau," despite its legalistic conclusions, based as they are, not on the record as submitted, but rather upon "inferences," "judicial knowledge" and "presumptions."

The result is "vague findings," which in fact have "whittled away" the statutory operating rights to a point where their continued operation would be impossible and unprofitable. In fact, your "review" will be, indeed, a "perfunctory process," if you cannot insist upon the Commission making "basic and essential" findings that are in fact based upon the record.

Seventhly, the Commission has "atomized the prior service, product by product," despite the fact that the record shows that the prior operations involved only the handling of commodities not requiring special equipment,[9]

[9] Remember that "general commodities" were granted on the "regular route operation"; that in both operations only one class of equipment, i. e., "insulated closed vans," was used. See Commission decision on Application of **Chas. Medlock, 30 M. C. C. 301**, which was a case in which the applicant had authority to transport "general commodities except those commodities requiring 'special equipment.'" The applicant then filed a new application for authority to transport "perishable commodities" in "refrigerator equipment." The Commission found that **additional authority was unnecessary, saying:**

> **"Applicant has been engaged in the transportation of perishable commodities in the past and protestants do not question his right to continue to handle such commodities in the future. Even were applicant denied the right to use refrigerator equipment,** it is not disputed that he could serve the same shippers to and from the same points

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and commodities which by their very nature must have been those of the "general class."

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in the transportation of the same commodities in equipment which he now operates. The use of refrigerator equipment, therefore, would not involve a substantial change in his holding out to serve the general public. The only effect of acquisition of such equipment is that he will be able to continue during all seasons of the year the same type of service heretofore rendered, instead of during winter months only. We are convinced, therefore, that applicant does not propose to render a service substantially different from that which he has heretofore made available.

"Classification of Motor Carriers of Property, supra, describes certain classes of motor carriers of property, including a class which confines itself to the transportation in refrigerator equipment of perishable solid commodities; but it is not to be taken as meaning that the transportation of general commodities necessarily precludes the use of refrigerator equipment.

"In specifying the service to be rendered by applicant pursuant to the certificate in question, we used the term 'general commodities' to indicate his general availability for the transportation of all types of freight, but limited the term by excepting certain particular commodities, including those requiring 'special equipment' which such carriers of general commodities seldom hold themselves out to haul. In so defining the service to be rendered, it was not our purpose to restrict the right of the carrier to add to his equipment or facilities, but rather to insure the continued conduct of his business within the bounds in which it had on the 'grandfather' date and thereafter been conducted. The limitation with respect to 'special equipment' is the only one presenting any important difficulty in interpretation. It is clear, for example, that it precludes the transportation of household goods in vans. On the other hand, we do not believe it precludes a general commodity carrier from rendering a more complete and adequate service to the public by providing equipment which serves to protect from deterioration commodities which are not otherwise within the terms of any of the exceptions and which he has from the outset transported.

"In determining the particular question here presented for determination, it will be observed that if applicant provided ice and protective coverings for the transportation of perishable commodities in ordinary closed-body trucks he would clearly not be in violation of the terms of the certificate. Proceeding on that premise, we do not believe the degree of refrigeration of the type of material or device used to provide temperature control should serve to distinguish between the rendition of a service within the scope of the certificate and one which more properly is a part of the operations engaged in by carriers of commodities requiring 'special equipment.' The substitution of mechanical devices for ice in the equipment possessed by applicant or the purchase of additional vehicles designed to provide temperature control does not, in our opinion, constitute the use of 'special equipment.' The substitution of mechanical devices for ice in equipment possessed by applicant or the purchase of additional vehicles designed to provide temperature control does not, in our opinion, constitute the use of special equipment in the instant case. It is, therefore, a service which may properly be rendered by applicant under the terms of the certificate held by him and the additional authority here sought is unnecessary. In view of our conclusions herein, the application will be denied." (Emphasis added.)

Obviously, under the decision the "items" transported by apppellant were of that "class" which could be transported by carriers of "general commodities" and consequently such "items" must have been those of a "general class."

True it is that from Nashville a substantial volume of the products hauled were those which might be arbitrarily generically classified as "packinghouse and dairy products, eggs and poultry," because in Nashville there is a large cold storage warehouse industry and the principal products which move to the area here involved move from this principal market in the same way that Atlanta is the principal market for other products moving to this same area. Certainly the volume of freight handled from the Carolinas might be **arbitrarily** generically classified as "cotton factory products," but again we point out in the normal and ordinary course of business a carrier does not haul "coals to Newcastle." In fact, we admit and insist that within the area here involved, as you will find in most any other area which you describe, there is a determinable flow of traffic which will involve a predominant volume of a particular item or class of commodity. The handling of such a "predominant volume" in the "natural and normal course of business" doesn't justify the **conclusion, inference** or **presumption** that by so engaging in such traffic the carrier has voluntarily, or otherwise, created "self-imposed" restrictions which would in the future preclude its participation in other than those "items" which it handled during the critical period in "volume."

Further, the Commission would directly ignore your mandates in that it, in effect, considers as a fact that certain items shown to have been handled in March, April and May, 1935, and not shown to have been handled in June and July, 1935, constituted an abandonment of the prior undertaking. There is no evidence to justify such a conclusion, except the "fact" itself, and this loses all significance when it is remembered that the abstracts of shipments submitted were only "representative" and naturally did not include those seasonable commodities which could only move in the period after June 1, 1935,

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such as peanuts, vegetables and fruits. And an examination of the abstracts[1] of shipments handled will disclose that in the natural and normal course of business a large number of varied items were handled.

It does violence to reason to conclude or infer that appellee on June 1, 1935 (before Part 2 of the Interstate Commerce Act was passed by Congress), changed the entire course of its normal and natural business so that it handled items thereafter, which it would not have handled before, simply so as to enlarge the scope of the operations which it could thereafter engage in under its "grandfather clause" claim.

Lastly, let us point out that the Commission has again directly gone contrary to the principles which you enunciated, in that they only grant to appellee the right to handle the **identical items** which they found it transported prior to June 1, 1935, excluding appellee's future engagement in the handling of other items of the same class, simply because each and every item of that class was not shown to have been handled during March, April and May, 1935. In fact, appellee's future operation is restricted to the handling of **those items which it handled in volume** and further restricted **to handling of such items between the specific points** where such **items were shown to have been handled** during March, April and May, 1935.

We have pointed out heretofore what we consider the important aspects of your decision in the **Carolina Case**, and we have given the reasons why we believe that the Court erred in dismissing the complaint and in sustaining the Commission's orders of July 1, 1943, and January 6, 1945. We again say that the principal difference between us and the Commission in the application of your dicta in **Carolina Case** to the instant case is in the basic reasoning of the Commission in viewing your decision as a correction of a technical error in the wording used by the

[1] Part of Exhibit 1 in this case.

Commission in the formulation of the "required findings." On the other hand, we think that your decision is a "Magna Carta" or "Bill of Rights" for Carriers, such as appellee, who assert presumptive rights to a certificate which would permit the continuation of irregular route operation under the Congressional "Grant of Rights." For that reason, and to that extent, the suggested "clarification" would be helpful, and insofar as this carrier is concerned, is necessary, because it can no longer carry the expensive burden of participating in "test cases" with the inexhaustible resources of the governmental agencies.

Appellee Was Engaged in Transporting a General Class of Commodities.

Affirmatively, we say that the record made before the Commission justifies the above conclusion. Further, we agree that the question here involved is

> "whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in 'bona fide operation' as a 'common carrier' of the group of commodities or of the class or classes of property during the periods in question."

There must be an affirmative answer to this question, even if you ignore the submitted record (as the Commission seems to have done) and simply consider the question on the basis of the facts set forth in the reports.

To do otherwise you must apply the Commission's process of reasoning, and

(a) atomize the service "product by product."

(b) segregate the disclosed operation into operations "from Nashville," "to Nashville," "from

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Florida," "from various designated points in Florida, Georgia and Alabama" instead of viewing the operation "as a whole."

(c) eliminate from consideration those items transported "with less frequency" and in "less quantity."

(d) eliminate from consideration those items which the Commission "infers" and thereby "presumes" to be "accommodation" shipments because other "items" were handled for the same shippers.

(e) by an arbitrary generic grouping of "varied items" into a class for the purpose of minimizing the number of "items handled."

(f) ignore the fact that certain of the "items" shown to have been handled in June and July, 1935, were handled in the "normal and natural course of business" in those months and not shown to have been handled in March, April and May, 1935, because they were seasonable products which were not harvested, processed and shipped in the spring months.

(g) by basing your ultimate conclusions on inferences, presumptions and fallacious conclusions, and not upon the record as submitted.

(h) by considering your decision in the **Carolina Case** as an admonition to formulate a technically correct basic finding rather than a statement of the principles **which must** be applied in the determination of a grandfather clause application.

Now, we realize that in the last analysis the answer to the question set out above involves a consideration (1) what "items" were actually transported and (2) which of those "items" can be eliminated from consideration as "sporadic, infrequent or occasional," and (3) finally, whether the items, as considered were transported "sufficiently regular," and whether the "coverage was sufficiently representative" to support the claim as made. If you do not have the right, as contended by appellee in its

motion, to determine whether the Commission has correctly answered this question, then your power of review on appeal is "perfunctory" indeed, and that "grant of Rights" assured to appellant by Congress is simply mere words and not an assurance that it and its owners can continue to earn its livelihood in an industry which it helped to establish.

But in order that you may consider this question properly, we ask that you now turn to the appendix attached to the report and order, where the Commission has summarized what it considers appellant's operation to be, by its arbitrary method of "generic groupings" of the items, shown on the abstracts, introduced in the record.[2] Rather, we ask that you examine the abstract itself. No one contends that a single item listed was not transported at the time and between the points shown. Mr. Harrington testifies without contradiction that every "item" tendered for transportation was handled;[3] that every item moving in the area was handled;[4] that all traffic known to move in the area was solicited;[5] that appellee did not keep records before March, 1935,[6] and that the items listed on the abstracts were representative of the type and class of commodities handled[6]; that all of the vehicles operated by appellee were designed for the handling of "perishable" as well as "non-perishable" freight.[7] We contend that under your decision in the **Carolina Case** that the Commission should include in its consideration the items handled on the **regular route**, as well as those handled on the **irregular routes** under your order that the operations

2 Part of Exhibit 1 in this record.

3 Transcript page 11 (Exhibit 1, this case).

4 Transcript pages 11, 61 (Exhibit 1, this case).

5 Transcript page 11 (Exhibit 1, this case).

6 Transcript page 9 (Exhibit 1, this record).

7 Transcript pages 9, 24, 50 to 60, inc. (Exhibit 1, this case).

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should be "viewed as a whole" rather than "atomized" and "pulverized" into a number of component parts.[8] Further, we contend that you should consider the items actually transported as shown by the abstract for the period May to July, 1935, inclusive, because otherwise you will fail, as the Commission did, to consider those items which were handled in the "normal and natural course of business," in the seasons in which such items ordinarily move. But, if we are in error, we have marked by appropriate symbol those items which are shown to have moved exclusively on regular route (Nashville-Atlanta) and those which moved in June and July, 1935, after the critical date.

---

[8] This the Commission refused to do, saying (sheet 5, report Jan. 6, 1945):

> "In its petition, applicant, in effect, contends that we are precluded from finding it to be a carrier of only special commodities in its irregular-route operations in view of our finding that it was a carrier of general commodities as to its regular-route operation, contending that in considering its irregular-route operations we erroneously eliminated all evidence of commodities transported in its regular-route operation. As previously stated, applicant applied for two separate and different operations, one a regular and the other an irregular-route operation. A review of the record discloses that in its regular-route operation it transported a variety of unrelated commodities and that its trucks were operated daily, except Saturday, regardless of the tonnage available, on fixed schedules, over a designated highway, and between fixed termini. In this operation freight that originated at, or was destined to, points beyond Nashville and Atlanta was interchanged at those points with other carriers. Its irregular-route operations, outbound, as will hereinafter be seen, consisted principally of perishable commodities, and such operations are in the nature of call-and-demand service. In these operations applicant attempted to secure truckload shipments and usually, but not always, loaded the trucks practically to full capacity. On the trips from Nashville, shipments have been solicited from several shippers and combined into truckloads, for transportation to points located in the same general territory in one of the aforementioned states on certain days of the week. Return loads consisted of commodities picked up at or near delivery points of outbound shipments."

Here the scope of the regular and irregular operations are said to be different because of the "frequency" of service on a "daily schedule" in regular route service as compared to irregular route service, but see the uncontradicted testimony of Mr. Harrington to the effect that trucks were loaded on "regular days" to the irregular route area served (Transcript page 60 [Exhibit 1, this case]).

Thus, this report differs from the reasoning and conclusions in the report of July 1, 1943, in that the Commission there based its conclusions to the same effect upon the "use of a different type of equipment," i. e., non-refrigerator type.

In the following list we have used the **identical description of the item as used by the shipper,** separating the shipments into those moving to Nashville and those moving from Nashville:[9]

TO NASHVILLE.

Legend: "x" before item indicates item only transported from Atlanta.

"xx" after item indicates item first transported after June 1, 1935.

Fruit juice	Baled cotton goods
Baled cotton goods	Cotton fabric
Granite	x Iron flats, rolls
Cotton piece goods	x Broilers
Bags towel sugar	x Bdls. silk bags
Roasted coffee	x Empty sugar bags
Oranges	x Bales sugar bags
Cotton goods	Tomatoes
Sugar	x Machinery
Osnaburg	Pins, pipes, rods, nuts,
Sheetings	bolts, wire and arm braces
Cotton fabrics	Domestics
6.85 Print	x Card clothing
Butter	Vegetables
Dry buttermilk	Baled fabric
x Cans	x Milk cans xx
x Drums cotton softener	Cotton factory products xx
x Cotton twine	Epsom Salts xx
Cotton sheeting	Orange juice xx
Brown cotton bagging	Grapefruit juice xx
Floor mops xx	x Cantaloupe xx
x Cantaloupe xx	x Drums xx
x Cross-arms xx	Watermelons xx
x Castings xx	Bulk sugar xx
Finished overalls xx	Overall material xx
Shelled peanuts xx	x Mops xx

[9] See Exhibits 1, 2, 3, 4 and 10 introduced before Commission (Exhibit 1, this case), covering shipments handled March, April, May, June and July, 1935.

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FROM NASHVILLE.

Legend: "x" before item indicates item only transported from Atlanta.

"xx" after item indicates shipment first transported in June and July, 1935.

x Frozen eggs
Meat
Butter
Dr. poultry
Cellophane
Cheese
Calves, pigs
Asst. meats
Fat backs
Eggs
Drums of meat
Hams
Bbls. beef
Boxes
x Fresh eggs
Supplies
Loin shoulders
x Household furniture xx
Rindless bacon xx
x Soda xx
Felt base rugs xx
Felt basing xx
Cotton piece goods xx
Bbls. of hearts xx
x Frozen egg whites xx
Frozen neck bones
Bags of calves
x Steel drums
Salt backs
x Cream cans
Chickens
x Empty milk cans
Beef rolls
Poultry
x Machine parts
Backs and bellies
Loins
Sheep
x Bags of meats
x Bundles of paper
Cotton bags
Bacon xx
Veal xx
x Butter boxes xx
Cases of eggs xx
Boxes of meat
Tubes xx
Rolls felt xx
Bags of meat xx
x Milk cans xx
x Frozen whole egg white xx

It is obvious that all of the commodties set out above are includable with the term "general commodities," and that the transportation of such items did not require "special equipment," as that term is described in the Commission's **Classification of Motor Carriers** order.[1] The actual transportation of such commodities coupled with the undisputed oral testimony to the effect that these items constituted the volume traffic moving within the area, can only justify the conclusion that the service performed was "sufficiently regular" and the coverage was "sufficiently representative" to support the claim made.

[1] Ex Parte MC-10, 2 M. C. C. 703.

The Commission has already found, bounded and described the territory in which it says that operations were conducted. The only question here raised is whether the commodities actually transported are sufficiently varied, and sufficiently representative of the class, to justify a continuance of operation involving the transportation of all items of that class, without restrictions which will limit the future operation to particular items, and those items between the named, designated points.

Congress has not "made a grant of rights" to the appellant if by the method here used the Commission is able to juggle the test of "substantiality" by a process of "atomization" and "pulverization" to the point where such statutory rights have been "whittled" entirely away. Congress didn't intend that the Commission should substitute "inferences," "presumptions," and assertions of "judicial knowledge" in lieu of factual findings on **the evidence of record.** The "standards which you have set forth" in the **Carolina Case** have not been applied to the **facts** in this case, rather through the use of the methods related, the Commission has distorted and ignored the **facts of record** and has then applied standard entirely alien to your requirements.

In this case, as in Florida v. United States, 228 U. S. 194, 215, there is an absence of a "suitable complete statement" and as was present in United States v. Baltimore & Ohio Ry., 293 U. S. 454, 464, an utter lack of the "basic and essential findings required to support the Commission's order," insofar as that order would restrict appellant's future operations to the handling of specific commodities between designated points within the prescribed geographical area. Truly, here, the total disregard of the facts of record and the Commission's reliance upon "inferences," "presumptions" and "judicial knowledge" justify the charge that the Commission's order is based upon "vague findings that lie hidden in the generalities," indulged in,

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and that a "substantial parity" in appellant's future operations, as compared to its operations as of the statutory date, will not result.

In such event that "property" which Congress intended to give to this pioneer motor carrier will be totally destroyed and its value wholly dissipated. When this occurs we respectfully submit that this cause does involve a substantial federal question, and that the motion for affirmance of the decrees of the District Court should be denied.

Respectfully submitted,

JAMES W. WRAPE,
Attorney at Law,
Sterick Building,
Memphis, Tennessee,
Attorney for Appellant.

Of Counsel:

HAROLD G. HERNLY,
Attorney at Law,
Transportation Building,
Washington, D. C.,

CATE & CATE,
Attorneys at Law,
Nashville, Tennessee.

September 20, 1946.

Certificate.

The undersigned hereby certifies that the foregoing reply was served upon all parties of record in this cause by the mailing of the same to the parties, at their address of record, with first-class postage fully prepaid. This 20th day of September, 1946.

.....

James W. Wrape.

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APPENDIX.

In the District Court of the United States
For the Middle District of Tennessee,
Nashville, Division.

Received for Entry in Open Court 9:30 A. M. July 7, 942. L. B. Ormes, Clerk, by S. E. Wasson, Chief D. C.

. H. Tompkins Company, Plaintiff,
vs.
nited States of America and Interstate Commerce Commission.
No. 258 Civil.

ORDER OF COURT.

The above entitled action came on for hearing on April 8, 1942, the plaintiff and defendants being represented by ounsel, and being submitted upon the pleadings, the exibits, oral arguments and briefs of counsel, and the Court aving entered its findings of fact and conclusions of law eciding that the complaint filed herein should be sus-ined,

It Is Therefore Ordered and Adjudged, That the com-aint filed herein should be, and the same is hereby, sus-ined insofar as is herein indicated.

2. That the order of the Interstate Commerce Commis-on issued in Docket MC-20783, insofar as it applied to e restrictions found in Findings of fact No. 5 (2) and), is set aside and the execution of the order in these rticulars is enjoined.

3. That this cause be remanded to the Interstate Commerce Commission for basic and essential findings, as required and pointed out in **United States of America and Interstate Commerce Commission, Appellants, vs. Carolina Freight Carriers Corporation,** and in Howard Hall Company, Inc., Appellant, vs. United States of America and Interstate Commerce Commission, both of which cases were decided by the Supreme Court on March 2, 1942.

/s/ Xen Hicks,
United States Circuit Judge,
6th Circuit,

/s/ Geo. D. Taylor,
United States District Judge,

/s/ Elmer D. Davies,
United States District Judge.

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In the United States District Court for the Nashville Division of the Middle District of Tennessee.

W. H. Thompkins Company,
Plaintiff,
vs.
United States of America and Interstate Commerce Commission,
Defendants.
No. 258 Civil.

FINDINGS.

The above entitled action came on for hearing before the duly constituted statutory court on April 18, 1942, and was submitted upon the pleadings, exhibits, arguments and briefs of counsel for plaintiff and defendants, and the Court enters its findings of fact and conclusions of law, as follows:

Findings.

1. That the plaintiff is a corporation existing under the laws of the State of Tennessee with its principal place of business within the jurisdiction of this Court.

2. That the plaintiff is engaged in the business of a motor carrier, operating as a common carrier in interstate commerce within the states of Tennessee, North Carolina, South Carolina, Georgia, Florida, and Alabama, prior to and since June 1, 1935. That an application was filed by the plaintiff with the Interstate Commerce Commission on February 12, 1936, seeking a certificate of public convenience and necessity that would authorize it to continue its operations under the provisions of Section 206 (a), Motor Carrier Act of 1935. That this application was referred to an examiner of the Interstate Commerce Commission for hearing, and the Examiner, in due course,

served his recommended report and order, to which exceptions were filed by the plaintiff and other parties of interest in that hearing. That on May 29, 1941, Division 5, of the Interstate Commerce Commission, served its report and order on this application. That the original application, all exhibits introduced at the hearing before the Examiner, a transcript of the proceedings before the Examiner, copies of his recommended report and order, and copies of all other orders entered by the Interstate Commerce Commission have been introduced as exhibits in this cause.

3. That the application, as originally filed, was amended and the plaintiff now seeks authority to continue certain operations over both regular and irregular routes, as follows:

Over regular routes, in the transportation of commodities generally:

Between Nashville, Tennessee, and Atlanta, Georgia, via U. S. Highway 41.

Over irregular routes, transporting general commodities:

Between Nashville, Tennessee, and points within 10 miles thereof, and Murfreesboro, Tennessee, on the on hand, and points and places in the States of North Carolina, South Carolina, Georgia, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida State Highway No. 30.

4. That the final order of the Interstate Commerce Commission, entered on May 29, 1941, provided for the issuance of a certificate of public convenience and necessity to the plaintiff, which would authorize the regular route service, as applied for, between Nashville, Tennessee, and Atlanta, Georgia, in the transportation of general commodities; and the transportation of certain specific commodities, over irregular routes as follows:

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From Nashville, Tennessee, to points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama on the east of U. S. Highway 31, and that part of Florida on and north of U. S. Highway 30, in the transportation of packing house and dairy products:

From Murfreesboro, Tennessee, to points and places in Georgia and Florida, on and north of U. S. Highway 30, in the transportation of dairy products;

And from points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama, on and east of U. S. Highway 241 (from the Tennessee-Alabama State line to Phenix City, Alabama) to Nashville, Tennessee, in the transportation of cotton factory products:

And from points and places in Florida, on and north of State Highway 30 to Nashville, Tennessee, in the transportation of canned and fresh fruit and canned fruit juices;

And from Jacksonville, Florida, to Nashville, Tennessee, in the transportation of coffee;

And from Elberton, Georgia, to Nashville, Tennessee, in the transportation of granite;

From Savannah and Port Wentworth, Georgia, to Nashville, Tennessee, in the transportation of sugar.

5. The order of the Interstate Commerce Commission, while finding that the plaintiff had conducted its common carrier operations within the area in which plaintiff sought to operate, drastically curtailed plaintiff's operations in the following way:

(1) It limited its irregular route operations, solely, to and from the radial point of Nashville, Tennessee, and eliminated plaintiff's right to serve that City's natural metropolitan area as a part of the radial point area.

(2) It limited plaintiff's operations to the transportation of certain specific items of a general class of property.

(3) It permitted plaintiff to transport certain items between designated points and parts of the area in which the Commission found that the plaintiff had conducted its operations.

Conclusions.

1. That the Court has jurisdiction of this proceeding.

2. It is impossible to say that in making its order curtailing plaintiff's operations, as indicated in (2) and (3) under Finding No. 5, the Commission applied the standards and tests held by the Supreme Court to be essential to a valid order in **United States of America and Interstate Commerce Commission, Appellants, vs. Carolina Freight Carriers Corporation,** and in **Howard Hall Company, Inc., Appellant, vs. United States of America and Interstate Commerce Commission,** both of which cases were decided by the Supreme Court on March 2, 1942; further it is not within our province to indicate the scope of the certificate which should be granted petitioner. That function is reserved to the Commission.

That the complaint filed by the plaintiff be sustained as indicated.

Xen Hicks,
United States Circuit Judge,
6th Circuit,

Geo. C. Taylor,
United States District Judge,

Elmer D. Davies,
United States District Judge.

In the District Court of the United States
for the Middle District of Tennessee,
Nashville Division.

W. H. Tompkins Company, now Tompkins Motor Lines, Inc.,
Plaintiff,
v.
United States of America and Interstate Commerce Commission,
Defendants.
No. 603 Civil.

ORDER.

Before Hicks, Circuit Judge, and Taylor and Davies, District Judges.

The Bill of Complaint is dismissed upon the grounds and for the reasons set forth in the Findings of Fact and Conclusions of Law this day filed in this case.

Approved for Entry:

/s/ Xen Hicks,
United States Circuit Judge,

/s/ Geo. C. Taylor,
United States District Judge,

/s/ Elmer D. Davies,
United States District Judge.

Received for Entry—
2:30 p. m. July 8, 1946,
L. B. Ormes, Clerk,
By H. London, D. C.

In the District Court of the United States
for the Middle District of Tennessee,
Nashville Division.

W. H. Tompkins Company, now Tompkins Motor Lines, Inc.,
Plaintiff,
v.
United States of America and Interstate Commerce Commission,
Defendants.
No. 603 Civil.

FINDINGS AND CONCLUSIONS.

The above entitled action came on for hearing before the duly constituted statutory court on November 23, 1945, and was submitted upon the pleadings, exhibits, arguments, and briefs of counsel for plaintiff and defendants, and the Court enters its findings of fact and conclusions of law, as follows:

Findings of Fact.

1. That the plaintiff is a corporation existing under the laws of the State of Tennessee with its principal place of business within the jurisdiction of this Court.

2. That the plaintiff is engaged in the business of a motor carrier, operating as a common carrier in interstate commerce within the states of Tennessee, North Carolina, South Carolina, Georgia, Florida and Alabama, and has been so engaged long prior to June 1, 1935. That an application was filed by the plaintiff with the Interstate Commerce Commission on February 12, 1936, seeking a certificate of public convenience and necessity that would authorize it to continue its operations under the provisions of Section 206 (a), Motor Carrier Act of 1935. That this Application

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was referred to an examiner of the Interstate Commerce Commssion for hearing, and the examiner, in due course, served his recommended report and order, to which exceptions were filed by the plaintiff and other parties of interest in that hearing. That on May 29, 1941, Division 5 of the Interstate Commerce Commission served its report and order on this application. That the original application, all exhibits introduced at the hearing before the Examiner, a transcript of the proceedings before the Examiner, copies of his recommended report and order, and copies of all other orders entered by the Interstate Commerce Commission have been introduced as exhibits in this cause.

3. That the application, as originally filed, was amended and the plaintiff now seeks authority to continue certain operations over both regular and irregular routes, as follows:

Over regular routes, in the transportation of commodities generally:

Between Nashville, Tennessee, and Atlanta, Georgia, via U. S. Highway 41.

Over irregular routes, transporting general commodities:

Between Nashville, Tennessee, and points within 15 miles thereof, and Murfreesboro, Tennessee, on the one hand, and points and places in the State of North Carolina, South Carolina, Georgia, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida State Highway No. 30.

4. That an order of the Interstate Commerce Commission, entered on May 29, 1941, provided for the issuance of a Certificate of Public Convenience and Necessity to the plaintiff, which would authorize the regular route service, as applied for, between Nashville, Tennessee, and Atlanta,

Georgia, in the transportation of general commodities: and the transportation of certain specific commodities, over irregular routes as follows:

> From Nashville, Tennessee, to points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama on the east of U. S. Highway 31, and that part of Florida on and north of U. S. Highway 30, in the transportation of packing house and dairy products.
>
> From Murfreesboro, Tennessee, to points and places in Georgia and Florida, on and north of U. S. Highway 30, in the transportation of dairy products;
>
> And from points and places in North Carolina, South Carolina, Georgia, and that portion of Alabama on and east of U. S. Highway ... (from the Tennessee-Alabama state line to Phenix City, Alabama) to Nashville, Tennessee, in the transportation of cotton factory products:
>
> And from points and places in Florida, on and north of State Highway 30 to Nashville, Tennessee, in the transportation of canned and fresh fruit and canned fruit juices;
>
> And from Jacksonville, Florida, to Nashville, Tennessee, in the transportation of coffee;
>
> And from Elberton, Georgia, to Nashville, Tennessee, in the transportation of granite;
>
> From Savannah and Port Wentworth, Georgia, to Nashville, Tennessee, in the transportation of sugar.

This order was set aside in part by this court on July 7, 1942, in cause No. 258, W. H. Tompkins Company v. United States of America, et al.

Thereafter, the Commission issued two reports on reconsideration, the last report dated January 6, 1945, being the order which plaintiff here seeks to set aside.

By said report and the order the Commission provided for the issuance of a Certificate of Public Convenience and Necessity to plaintiff which would authorize plaintiff to

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conduct the identical operations, with the identical retsrictions, as was contained in the Commission order of July 1, 1943, which was heretofore set aside by this Court.

5. While the Commission found that the plaintiff had conducted common carrier operations within the area in which plaintiff sought to continue to operate, the plaintiff's operations are continued to be curtailed in the following way:

1. Plaintiff's right to serve the Metropolitan area surrounding Nashville, Tennessee, is denied.

2. Plaintiff is denied the right to transport all items of a general class between all points in its territory, and

3. Plaintiff is denied the right to transport all items authorized between all points.

Conclusions of Law.

1. This Court has jurisdiction of this cause and of the parties thereto.

2. This Court's decision under date of July 7, 1942, in Civil Action No. 258, setting aside the Commission's order of May 29, 1941, and remanding the case to the Commission for findings in accordance with the statutory standards set forth in the decisions of the Supreme Court on March 2, 1942, in **United States v. Carolina Freight Carriers Corporation**, 315 U. S. 475, and **Howard Hall Company v. United States**, 315 U. S. 495, did not preclude the Commission from exercising its statutory function of considering, passing upon, and deciding upon plaintiff's application in accordance with applicable law and the evidence of record in the proceeding before the Commission; nor does the said decision of July 7, 1942, with respect to the Commission's said order of May 29, 1941, operate under

the doctrine of res judicata as a determination that the Commission's subsequent order of January 6, 1945, is in any respect unlawful or invalid.

3. The Commission had jurisdiction over the proceedings wherein the said order of January 6, 1945, was made, and to make the said order. Said order was within the constitutional and statutory authority of the Commission, and was not arbitrary or based upon mistake of law or misapplication of the proper standards. Said order was made by the Commission upon substantial evidence of record and in accordance with the applicable law and was and is valid and lawful in all respects.

4. The relief prayed for in the complaint should be denied, and the complaint dismissed, plaintiff to pay the costs.

Judgment accordingly.

s/ Xen Hicks,
United States Circuit Judge,

s/ Geo. C. Taylor,
United States District Judge,

.....
United States District Judge.

I am of the opinion that the Commission acted arbitrarily in denying to plaintiff the right to transport a general class of commodities between its radial bases and all points in its territory, and that the limitation placed on plaintiff's activities in this respect was without statutory sanction and is a denial of plaintiff's rights. It appears that the Commission improperly restricted plaintiff's actual operations and prior opportunities beyond the requirements of the statute, and, apparently, ignored the history of plaintiff's holding out as a carrier of general

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commodities in conjunction with its actual operations, by limiting plaintiff's operations to a strict pattern of prior activities during a relatively small period of time, and did not take into consideration seasonal shipments, which action of the Commission is unwarranted and unsupported by the record in this case.

I am, therefore, of the opinion that the Commission has not properly applied the statutory standards prescribed by the Congress and the principles announced by the Supreme Court in the cases of U. S. v. Carolina Carriers Corp. (315 U. S. 475) and Howard Hall Co., Inc. v. U. S. et al. (315 U. S. 495). It appears that the order complained of is practically identical with the order set aside in part by this Court on July 7, 1942, and it does not appear that the Commission followed the mandate of this Court requiring it to apply the statutory standards and tests held by the Supreme Court to be essential to a valid order, or that the Commission applied any standards other than those applied in the first instance.

In my opinion, plaintiff's bill should be sustained, and the relief prayed for granted.

This 5th day of July, 1946.

s/Elmer D. Davies,
United States District Judge.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

Interstate Commerce Commission

No. MC-20783

W. H. Tompkins Company Common Carrier Application

Decided January 6, 1945

Upon reconsideration, findings in prior report in No. MC-20783, 42 M.C.C. 349, affirmed. Applicant found entitled to continue operations as a common carrier by motor vehicle, of (1) general commodities, with certain exceptions, between Nashville, Tenn., and Atlanta, Ga., over a regular route, (2) special commodities from Murfreesboro, Tenn., to points in Georgia and a specified portion of Florida, over irregular routes, and return with returned or rejected shipments, and (3) special commodities from and to Nashville, on the one hand, and points in Georgia, North Carolina, South Carolina, and specified portions of Alabama and Florida, on the other, and return with returned or rejected shipments, over irregular routes. Issuance of an amended certificate approved upon compliance by applicant with certain conditions, and application denied in all other respects. Other report, 29 M.C.C. 359.

Appearances as shown in prior reports.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION.

Division 5, Commissioners Lee, Rogers, and Patterson, by Division 5:

The proceeding in No. MC-20783 has been the subject of two prior reports which also embraced No. MC-20783 (Sub-No. 1), **W. H. Tompkins Company Extension of Operations—Seven States.** In the original report, 29 M.C.C. 359, decided May 29, 1941, division 5 granted applicant in No. MC-20783 a certificate by virtue of its operations on and since June 1, 1935, under the "grandfather" clause of section 206 (a) of the Interstate Commerce Act, as a common carrier by motor vehicle (1) of general commodities, with exceptions, between Nashville, Tenn., and Atlanta, Ga., over U. S. Highway 41, serving no intermediate points; and (2) of special commodities, over irregular routes, from and to the points and in the manner described in appendix A hereto. In No. MC-20783 (Sub-No. 1), applicant was found to be entitled to a certificate authorizing it to conduct the operations described in appendix B hereto. The applications were denied in all other respects. On March 10, 1942, a certificate was issued to applicant covering the above-described operations. By order entered August 7, 1942, division 5 authorized the issuance of an amended certificate to Tompkins Motor Lines, Inc., because applicant's name was so changed. The original report was entered before the decision of the United States Supreme Court in **United States v. Carolina Carriers Corp.**, 315 U. S. 475, hereinafter called the **Carolina case**, was rendered. Applicant thereafter brought action in the

United States Court for the Middle District of Tennessee to annul and enjoin the Commission's order, insofar as it related to the irregular-route operations sought in No.

MC-20783, the action being hereinafter referred to as the **Tompkins case**, and the court did annul and enjoin the order, upon the sole ground of insufficiency of findings, remanding the proceeding to the Commission for consideration in conformity with the principles enunciated in the **Carolina case**. Thereafter the Commission, upon its own motion, vacated and set aside the said order of May 29, 1941, and reopened both proceedings for reconsideration on the record as made. In the prior report on reconsideration, 42 M.C.C. 349, decided July 1, 1943, we granted applicant, in No. MC-20783, a certificate authorizing continuance of operations, in interstate or foreign commerce, as a common carrier by motor vehicle, (1) of general commodities, with exceptions, between Nashville and Atlanta, over U. S. Highway 41, serving no intermediate points; and (2) of special commodities, over irregular routes, from and to the points and in the manner described in appendix C hereto, and in No. MC-20783 (Sub–No. 1), we affirmed the findings in the original report.

Thereafter applicant filed a petition for reconsideration only with respect to the irregular-route operations sought in No. MC-20783. Upon consideration of applicant's petition and the record, we vacated and set aside our order of July 1, 1943, as subsequently modified, insofar as it denied the application in No. MC-20783, and that proceeding was reopened for reconsideration on the present record.

Although a much wider authority was originally sought, applicant, by its present petition, now contends that it is entitled to a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, in the transportation of general commodities, with certain exceptions,[1]

[1] Exceptions are loose bulk commodities, livestock, dangerous explosives, currency, bullion, valuable jewelry, articles of virtu, commodities contaminating or injurious to other lading, and articles exceeding the limits of ordinary equipment and loading facilities.

(1) between Nashville and Atlanta over U. S. Highway 41; and (2) between Nashville and points in its metropolitan area (within 15 miles of Nashville) and Murfreesboro, Tenn.,[2] on the one hand, and, on the other, points and places in Georgia, North Carolina, South Carolina, those in Alabama[2] on and east of U. S. Highway 31, and those in Florida[2] on and north of Florida Highway 30. Therefore, the application will be considered amended accordingly.

Although the essential facts of record are set forth in the original and prior reports we will review the entire record and restate in this report those facts to the extent necessary for clarity of discussion in disposing of the issues raised by applicant's petition.

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Applicant was incorporated on February 27, 1935, to take over the trucking business and operating rights of W. H. Tompkins, an individual, hereinafter called Tompkins. Tompkins held four permits from the Tennessee Railroad and Public Utilities Commission, authorizing interstate operations over designated highways between Nashville and State boundaries with Alabama, Georgia, North Carolina, and Virginia. He also held a permit from the Alabama Public Service Commission and had an application on file with the Florida Railroad Commission. In April 1935 the Tennessee permits were reissued in the name of applicant. Tompkins and applicant purchased licenses and paid mileage taxes as required by the States in which they operated.

On February 27, 1935, applicant's predecessor owned 4 trucks and leased about 6 others, and on June 1, 1935,

2 To avoid repetition, reference herein to Tennessee, Alabama, and Florida will only allude to Nashville and Murfreesboro, Tenn., and points within 15 miles of Nashville, points in Alabama on and east of U. S. Highway 31, and points in Florida, on and north of Florida Highway 30, respectively, unless otherwise indicated.

applicant owned 5 trucks and leased 8 other trucks. All of applicant's trucks, except 1 pick-up truck used in Atlanta, were of the usual van type to which insulation material had been added to the bodies for the protection of perishable commodities requiring refrigeration.

Applicant originally applied for two separate kinds of operations, the irregular-route operations here involved and for two regular routes, one between Nashville and Birmingham, Ala., which was later withdrawn, and one between Nashville and Atlanta, which was granted. As we indicated in our prior report on reconsideration, the grant of authority in the original report to transport general commodities, with exceptions, between Nashville and Atlanta over a regular route as set forth in appendix C was a most liberal grant, but since none of the parties questioned such finding or that applicant's operations were those of a common carrier we affirmed the prior findings in those respects. Applicant by its present petition for reconsideration does not question such findings and in view thereof they are here reaffirmed. For such reason and for reasons hereinafter discussed, the regular route as granted has and will be treated as a separate and different operation from the irregular-route operations, and our discussion herein will be confined to the claimed irregular-route operations, except as otherwise indicated.

Applicant in its petition contends that the findings in our prior report with respect to applicant's claimed irregular-route operations are in direct contravention of the findings of the Court in the **Tompkins case**. With this contention we do not agree. In remanding the instant proceeding, the Court in the **Tompkins case** did not conclude that the findings in the original report were wrong, but merely that it was impossible to say whether the standards and tests enunciated in the **Carolina case** had been applied in arriving at such findings.

Applicant further contends that in arriving at our prior

findings we failed to apply the standards and tests enunciated in the **Carolina case** and as applied in other "grandfather" applications. In support of this contention it argues that it has always held itself out to transport any commodity regularly moving within the scope of its amended application, and that it did not restrict its operations to specific commodities from or to specific points or territories; that in the absence of affirmative evidence indicating that it restricted its operations we are precluded by the principles announced in the **Carolina** case from restricting its operations to specific commodities from and

to specific points or territories, and that accordingly it is entitled to transport general commodities throughout the entire territory.

In the **Carolina case**, in discussing section 206(a), the Court said:

> * * * the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior bona fide operations."

And in discussing the showing required of an applicant under the "grandfather" clause, the Court in that case said:

> It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities. * * * Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. * * * The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was

in "bona fide operation" as a "common carrier" of the group of commodities or of the class or classes of property during the periods in question.

The Court also recognized that a carrier's status may vary within a territory, for it said:

> * * * an applicant's status may vary from one part of the territory to another or be different in northbound shipments than in southbound shipments.

With respect to the extent of the territory which an applicant may serve the Court said:

> Authority to operate within a specified "territory" may include permission to serve all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. * * * The act provides the test of "bona fide operation". That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. * * * Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. * * * Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed.

It will thus be seen that under the principles announced by the Court in the **Carolina case**, we are authorized to grant authority based on proven "bona fide operations" as limited by applicant, and we are not, under the principles announced in that case, or under the statute, required or authorized to grant a more extensive authority in order to enable a carrier to engage in operations never engaged

in on and prior to the critical date merely to assure such carrier a more profitable operation than that which it had planned or conducted prior to the statutory date.

Although we are convinced that our findings in the prior report were correct and that they were in conformity with the principles enunciated in the **Carolina case**, we will again review the facts of record and our conclusions herein will be based on the principles enunciated by the Court in that case.

In its petition, applicant, in effect, contends that we are precluded from finding it to be a carrier or only special commodities in its irregular-route operations in view of our finding that it was a carrier of general commodities as to its regular-route operation, contending that in considering its irregular-route operations we erroneously eliminated all evidence of commodities transported in its regular-route operation. As previously stated applicant applied for two separate and different operations, one a regular and the other an irregular-route operation. A review of the record discloses that in its regular-route operation it transported a variety of unrelated commodities and that its trucks were operated daily, except Saturday, regardless of the tonnage available, on fixed schedules, over a designated highway, and between fixed termini. In this operation freight that originated at, or was destined to, points beyond Nashville and Atlanta was interchanged at those points with other carriers. Its irregular-route operations, outbound, as will hereinafter be seen, consisted principally of perishable commodities, and such operations are in the nature of call-and-demand service. In these operations applicant attempted to secure truckload shipments and usually, but not always, loaded the trucks practically to full capacity. On the trips from Nashville, shipments have been solicited from several shippers and combined into truckloads for transportation to points located in the same general territory in one of the

aforementioned States on certain days of the week. Return loads consisted of commodities picked up at or near delivery points of outbound shipments.

From the above it will be seen that applicant's regular-route operation differed materially from its irregular-route operations. Therefore, we are not precluded from finding that its status with respect to its regular-route operation differed from its status with respect to its irregular-route operations, or from considering the two operations separately, under the principles enunciated by the Court in the **Carolina case.**

The evidence adduced on behalf of applicant included the testimony of its manager, who has been employed by applicant and its predecessor since February 1, 1935, applicant's only witness, and abstracts listing the shipments transported by it during the representative periods of March, April, May, June,

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and July of the years 1935, 1936, and 1937.[3] The abstracts cover the bulk, if not all, of the shipments transported during these months and are representative of those transported during the other periods of the respective years. The oral testimony is general in nature and relates to no specific shipments not covered by the abstracts. No shipments are shown prior to March 1935 because applicant was only incorporated on February 27, 1935, and its predecessor kept no permanent records. The abstracts are deficient in that in many instances they do not clearly describe the shipments transported. For example, some shipments are listed as "print in rolls," "bags runner No. 2 shelled", "M. H. Reg" and "M. H. pulv.", "package", and "bales". However, the abstracts

[3] Reference hereinafter to 1935, prior and subsequent to June 1 or the statutory date, 1936, and 1937, will have reference to the above-described representative periods, unless otherwise indicated.

have been analyzed as accurately as possible and the results thereof for 1935 are set forth in appendix D hereto.

Applicant seeks two base points or territories in Tennessee, one, Murfreesboro, and the other, Nashville and all points within 15 miles thereof. Since there is a wide difference between the services actually rendered from and to these base territories, and the operations in one direction differ materially from those in the other these services will be discussed separately, except where they lend themselves to a joint discussion. Shipments originating in Tennessee, within the scope of this application, will be considered as moving outbound and those destined to points in that portion of Tennessee will be referred to as moving inbound.

Operations From and To Murfreesboro.

A study of appendix D and the abstracts of shipments transported during the representative periods discloses that on and prior to June 1, 1935, applicant's operations at Murfreesboro were limited solely to the transportation of cheese from Murfreesboro to a number of points in Georgia and Florida. After the statutory date applicant continued to transport cheese, and since some time in 1936 it transported butter, eggs, and poultry from Murfreesboro to points in Florida and Georgia. The only shipments shown to have ever been transported from Murfreesboro to points in other States were 10 shipments of butter to Charlotte, N. C., in 1936, and 2 shipments of cheese to Birmingham, Ala., in 1937. In the reverse direction not a single shipment of any commodity from any point in the States involved was transported into Murfreesboro prior to June 1, 1935. And the only interstate shipments shown to have ever been transported into Murfreesboro was one shipment of cantaloupes and two of watermelons in July 1935, and one of tablets and school forms and one of paint in

May 1937, all from Atlanta. In view of applicant's very limited actual outbound service from Murfreesboro prior to the statutory date (the transportation of only one commodity, cheese), we may disregard its claimed holding out to transport general commodities between Murfreesboro and all points within the destination area sought. Furthermore, since applicant did not conduct any operations during the critical period from Murfreesboro to points in any

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State, other than Georgia and Florida, it is clear that applicant is not entitled to "grandfather" rights to conduct any operations from Murfreesboro, other than to points in Georgia and Florida. In view of the total lack of inbound service to Murfreesboro prior to June 1, 1935, applicant has failed to establish "grandfather" rights to transport any commodity to that point.

In the prior report we granted applicant authority to transport dairy products, eggs, and poultry from Murfreesboro to points in Georgia and Florida on and north of Florida Highway 30, and return with returned or rejected shipments. Although the record reveals that applicant transported only cheese from Murfreesboro during the critical period, since cheese is a dairy product and since other dairy products, eggs, and poultry, all of which are closely related perishable commodities, have been actually transported since the statutory date, we are constrained to view the operations liberally, as we did in the prior report, and affirm our prior findings with respect to Murfreesboro.

Nashville Outbound Operations.

Commodities.—A study of appendix D discloses that applicant transported 371 shipments outbound prior to June 1, 1935. All but 10 of these consisted of the perishable

commodities of meat, butter, cheese, poultry, and eggs. The other 10 shipments consisted of 5 of cotton bags, 4 of cellophane, and 1 of drums. In 1935, after the statutory date, applicant transported 155 shipments and all but 9 of these consisted of meats, butter, cheese, poultry, and eggs. The other 9 consisted of 2 shipments of cotton piece goods, 2 of cellophane, and 1 each of paint, felt, felt basing, felt base rugs, and felt base carpeting. The aforementioned movements of drums, paint, and cellophane were small less-than-truckload shipments, ranging in weight from 23 to 679 pounds per shipment, from Neuhoff Packing Co., and Swift & Co., to Swift & Co. Four of the shipments of cotton bags were consigned to Swift & Co., and 1 was consigned to "Armour Fert Wks." All of the non-perishable commodities, transported during the critical period may reasonably be presumed to have been accommodation shipments for the packing companies for whom applicant transported perishable commodities. Of the non-perishable commodities transported by applicant in 1935, after the statutory date, only cellophane moved prior to the statutory date. Cotton piece goods falls within the same general class of commodities as cotton bags but the other commodities do not fall within the same general class with any commodity that moved prior to the statutory date.

Applicant's outbound operations were expanded in 1936 and 1937. In 1936, over 600 shipments were transported outbound of which 36 consisted of commodities other than packing-house and dairy products, poultry, and eggs. Of these only 1 and part of another shipment consisted of cellophane scrap and none of these shipments consisted of cotton piece goods or cotton bags. Although applicant transported several commodities in 1936 and 1937 that were not transported outbound prior to the statutory date, its principal outbound operations continued to be the transportation of the aforementioned perishable commod-

ities. The sporadic transportation of the 3 non-perishable commodities transported by applicant during the critical period, even if we

assume that they were not accommodation shipments for the packing plants served, is insufficient to broaden applicant's special-commodity service comprising the transportation of packing-house and dairy products, poultry, and eggs, all of a perishable nature, into a general-commodity service embracing numerous unrelated classes of property.

Obviously, the specialized service actually rendered outbound has not been consistent with applicant's alleged holding out of a much broader service, and therefore, we believe that its claimed holding out to carry a much wider variety of commodities should be disregarded. We conclude that applicant has been engaged in bona fide operations outbound on and continuously since June 1, 1935, as a motor common carrier of only special classes of commodities; packing-house products, dairy products, poultry, and eggs.

Base territory.—As previously stated, applicant seeks as one of its base territories, Nashville and all points within 15 miles thereof. Although there are a number of small towns and villages within that area, a study of the abstracts of shipments discloses that Nashville is the only point within that area ever served by applicant either prior or subsequent to the statutory date. Shipments from one point only, during the representative periods of 1935, 1936, and 1937, is in our opinion, insufficient to establish "grandfather" rights to serve all points within a thickly populated area 30 miles in diameter. Therefore, since Nashville is the only point ever served within the area sought we conclude that applicant's Nashville base territory should be confined to Nashville.

Destination territory.—Having determined the commodities transported and the base origin point, we shall now determine the destination area to which applicant tran ported shipments of packing-house and dairy products, poultry, and eggs from Nashville. During the critical period applicant transported 361 shipments of the above-named perishable products from Nashville, to 29 points scattered throughout Georgia, North Carolina, South Carolina, Alabama, and Florida. After the statutory date shipments of these commodities were transported to most of these and to several additional points scattered throughout the aforementioned destination territory, we are of the opinion that the points shown to have been served prior and subsequent to the statutory date are sufficiently representative to authorize a grant of the destination territory sought and our grant, therefore, will include authority to transport the aforementioned perishable commodities from Nashville to points in Georgia, North Carolina, South Carolina, and the portions of Alabama and Florida described in footnote 2.

Nashville Inbound Operations.

A study of the evidence reveals that prior to June 1, 1935, on return trips applicant transported several inbound shipments of canned and fresh fruits and vegetables and canned fruit juices from scattered points in Florida; 21 shipments of coffee from Jacksonville, Fla.; 66 shipments of cotton-factory products from 17 points scattered generally throughout Alabama, Georgia, North Carolina, and South Carolina; 1 shipment of electrical supplies from Birmingham; 3 of granite from Elberton, Ga.; 4 of sugar from Savannah and Port Wentworth, Ga.; and 1 of buttermilk from Charlotte, all destined to Nashville. No other shipments were transported on return trips during the critical period.

After the statutory date applicant continued to transport cotton-factory products from a number of points in Alabama, Georgia, North Carolina, and South Carolina; sugar from Savannah and Port Wentworth, granite from Elberton, coffee from Jacksonville, and fruit and vegetables and fruit juices from Florida to Nashville. In addition, applicant increased its inbound operations, as it did its outbound, and transported other commodities but it never transported any more shipments of buttermilk and only one other shipment of electrical supplies from Birmingham.

A review of the evidence previously set forth herein discloses a wide variance between applicant's purported holding out and its actual operations on and prior to June 1, 1935. Its inbound operations were limited to a narrow group of commodities according to the State and individual points served. Its inbound shipments from Alabama, with one exception, North Carolina, and South Carolina, with one exception, consisted of cotton-factory products. Similarly all shipments from Georgia points inbound during the critical period were of cotton-factory products, except those of sugar and granite which were confined to specified points. Inbound shipments from Florida consisted of entirely different commodities than those from the other States. For instance no fruits and vegetables were originated at points in any State other than Florida, coffee originated only at Jacksonville, sugar at Savannah and Port Wentworth, and granite at Elberton. Obviously applicant could have secured other commodities inbound and could have secured such commodities as sugar, coffee, and granite from other points within the destination territory sought, if it had endeavored to conduct a regular general-commodity operation. It is clear, therefore, that applicant restricted its inbound oper-

ations to the transportation of the respective commodities described and from the particular points and areas set forth above, and the grant of authority herein will be limited accordingly.

In its inbound operations applicant has never served any point in the claimed Nashville area other than Nashville proper; therefore we conclude, as we did in its outbound operations, that its Nashville base territory should be confined to Nashville. We also conclude that on and continuously since June 1, 1935, applicant has been engaged in the transportation of cotton-factory products from points in Georgia, North Carolina, South Carolina, and that portion of Alabama described in footnote 2; canned and fresh fruits and vegetables, and canned fruit juices from points in that portion of Florida described in footnote 2; granite from Elberton; coffee from Jacksonville; and sugar from Savannah and Port Wentworth, to Nashville.

Discussion.

We are not unmindful that applicant claims to have held out to transport any commodity regularly moving within the scope of its operations. As previously stated, the Court in the **Carolina case** recognized that a carrier's operations in one direction may differ from those in the reverse direction; that the services actually rendered to and from various points and territories may differ; and that an alleged holding out to transport general commodities without actual operations consistent therewith is not sufficient to establish "grandfather" rights

of such broad authority, and it announced certain tests for determining a carrier's "grandfather" rights. We have applied those tests in reaching our ultimate conclusions in this proceeding, as well as in other similar pro-

ceedings. See No. MC-4920, **R. R. Wallace Common Carrier Application,** ... M. C. C. ..., decided April 13, 1944, and No. MC-11207, **Deaton Truck Lines, Inc. (Successor in Interest to C. D. Deaton), Common Carrier Application,** ... M. C. C. ..., decided July 4, 1944.

Applicant's outbound and inbound irregular-route operations differ materially and they follow a well-defined pattern which was determined by applicant's own action. The fact that applicant's inbound operations from Florida during the critical period differed from those from the other States and that its inbound and outbound operations differ is shown by the actual service rendered.

In its petition, applicant claims to have handled over 100 different commodities during March, April, and May 1935, and in support of that contention, it names many commodities that were transported only in its regular-route operations. Such commodities, therefore, may be disregarded in determining its irregular-route operations, which are the only operations here questioned. A further study of the abstracts reveals that they list many different kinds and descriptions of some of the commodities. For example, included in the abstracts are: "D. S. Butts", "Meat, D S Backs", "Fat backs", "Froz neck bones", "Meat, calves, cattle, rounds, fat back", and "Meat, sheep, lamb loins," all of which are meats of one kind or another, and therefore, a class of perishable commodities, which applicant will be authorized to transport. Applicant also names pins, pipe, rods, nuts, bolts, wire, and arm braces as being commodities transported during the critical period. These commodities were all included in one shipment transported from Birmingham to Nashville on May 23, 1935, and discussed in our prior report and herein as a shipment of electrical supplies, which is the way they are listed in the original abstracts. The only other shipment of electrical supplies shown to have been transported was a shipment on March 30, 1936, from Birmingham to Nashville.

It is a well known fact, of which we may take judicial notice, that Birmingham is an important iron and steel center; however, only one shipment of such commodities was transported from there prior, and one subsequent to the statutory date. There are also a number of well known and important ports, and industrial and distribution centers, such as Nashville, Birmingham, and Mobile, Ala., Augusta and Savannah, Ga., Jacksonville and Tampa, Fla., Charlotte, Raleigh, and Wilmington, N. C., and Charleston and Columbia, S. C., included in the involved territory which ship and distribute a wide variety of commodities. However, only coffee was transported from Jacksonville, and sugar only from Savannah and Port Wentworth. Granite was shipped from only one point, Elberton, Ga., and no fruits and vegetables or peanuts originated in Alabama or Georgia prior to the statutory date although the record shows that the principal commodities moving from these two States to the Nashville area were sugar, peanuts, fruits, and canned goods, and that Georgia has big marble quarries. Considering the points and territory served by applicant it is inconceivable that it was unable to secure shipments of more and varied commodities and that such commodities as sugar, coffee, and granite could not have been obtained from other points if it had endeavored to render a regular general-commodity

operation. To authorize the general-commodity irregular-route operations sought in the instant application would not be placing applicant on a substantial parity with its "bona fide operations" on the statutory date as required by the act and the principles enunciated in the **Carolina case**, but it would be authorizing applicant to institute new operations not conducted on June 1, 1935, operations for which public convenience and necessity must be established.

In its petition, applicant also contends that by terming

certain shipments of dairy products, cotton-factory products, and coffee, as rejected or returned in our prior report, we eliminated instances of transportation which would swell the sum total of the number of the items transported of a general class. A review of the evidence reveals that applicant submitted a corrected abstract of shipments transported in 1935, in which the shipment of cotton-factory products and the one of coffee, mentioned in our prior report as possibly being rejected or returned shipments, are listed as moving to and not from Nashville. The single shipment of dairy products (buttermilk) from Charlotte to Nashville, regardless of whether it was a returned or rejected shipment, is insufficient to broaden applicant's special-commodity operations into that of a general-commodity operation. In an operation similar to that of applicant's there are necessarily an occasional returned or rejected shipment and the transportation of such shipments is incidental to the principal operation, therefore, our grant herein will include such authority.

Ultimate Findings.

Upon reconsideration, we affirm our findings in our prior report, 42 M. C. C. 349, that applicant was, on June 1, 1935, and continuously since has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities, from and to the points, and in the manner described in appendix C; that it is entitled to a certificate of public convenience and necessity authorizing the continuance of such operations, and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an amended certificate will be issued herein superseding the outstanding certificate issued on March 10, 1942. An order will be entered denying the application except to the extent granted herein.

No. MC-20783

Appendix A.

Authority granted in No. MC-20783, 29 M. C. C. 359.

General commodities, except commodities in bulk, livestock, dangerous explosives, articles of extraordinary value, and household goods as defined in **Practices of Motor Common Carriers of Household Goods**, 17 M. C. C. 467: Between Nashville, Tenn., and Atlanta, Ga., over U. S. Highway 41, serving no intermediate points.

Special commodities, over irregular routes, as shown below:

Packing-house and dairy products, eggs, and poultry from Nashville to points in Georgia, North Carolina, South Carolina, those in Alabama on or east of U. S. Highway 31, and those in Florida on or north of Florida Highway 30.

Dairy products, eggs, and poultry from Murfreesboro, Tenn., to points in Georgia and those in Florida on or north of Florida Highway 30.

Cotton-factory products from points in Georgia, North Carolina, and South Carolina, and those in Alabama on or east of U. S. Highway 241 (from the Tennessee-Alabama State line to Phenix City, Ala.), to Nashville.

Canned and fresh fruits, and canned fruit juices from points in Florida on or north of Florida Highway 30 to Nashville.

Coffee from Jacksonville, Fla., to Nashville.

Granite from Elberton, Ga., to Nashville.

Sugar from Savannah and Port Wentworth, Ga., to Nashville.

No. MC-20783

Appendix B.

Authority granted in No. MC-20783 (Sub-No. 1), 42 M. C. C. 349.

Packing-house and dairy products, eggs, and poultry: (1) From Montgomery, Ala., to Nashville, Tenn., and points in Georgia; (2) from Atlanta, Ga., to Chattanooga, Tenn., and points in Alabama on or east of U. S. Highway 31, Florida, North Carolina, and South Carolina; (3) from Moultrie, Ga., to Chattanooga and Nashville and points in Florida, North Carolina, and South Carolina; and (4) from Nashville to points in Florida south of Florida Highway 30.

Dairy products, eggs, and poultry: (1) From Columbia, Franklin, Lawrenceburg, Lewisburg, McMonnville, Petersburg, Pulaski, Tullahoma, and Woodbury, Tenn., to points in Alabama on or east of U. S. Highway 31, Florida, Georgia, North Carolina, and South Carolina; and (2) from Murfreesboro, Tenn., to points in Alabama on or east of U. S. Highway 31, Florida, south of Florida Highway 30, North Carolina, and South Carolina.

Lard and vegetable oil compounds: (1) From Jacksonville, Fla., to Atlanta; and (2) from Charlotte, N. C., to points in South Carolina.

Tallow: (1) From Mobile, Ala., and Jacksonville to Atlanta; and (2) from Savannah, Ga., to Atlanta and Charlotte.

Canned and fresh fruits, and canned fruit juices: From points in Florida on or north of Florida Highway 30 to Chattanooga.

Peanuts: From points in Georgia south of U. S. Highway 80 (from Columbus to Macon, Ga.) and west of

Georgia Highway 11 (from Macon to the Florida State line), including points on the designated portions of said highways, to Nashville.

Pickles: From Montgomery to Nashville.

Pimientos: From Vienna, Ga., to Nashville.

Pottery: From Nashville to Shelby, N. C., and points in Alabama on or east of U. S. Highway 31, Florida, Georgia, and South Carolina.

No. MC-20783

Appendix C.

Authority granted in No. MC-20783, 42 M. C. C. 349.

General commodities, except commodities in bulk, livestock, dangerous explosives, articles of extraordinary value, and household goods as defined in **Practices of Motor Common Carriers of Household Goods**, 17 M. C. C. 467: Between Nashville, Tenn., and Atlanta, Ga., over U. S. Highway 41, serving no intermediate points.

Special commodities, over irregular routes, as shown below:

Dairy products, eggs, and poultry from Murfreesboro, Tenn., to points in Georgia and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Packing-house and dairy products, eggs, and poultry from Nashville to points in Georgia, North Carolina, and South Carolina, those in Alabama on and east of U. S. Highway 31 and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Cotton-factory products from points in Georgia, North Carolina, and South Carolina and those in Alabama on and east of U. S. Highway 31, to Nashville, and return with returned or rejected shipments.

Canned and fresh fruits and vegetables and canned fruit juices from points in Florida on and north of Florida Highway 30 to Nashville, and return with returned or rejected shipments.

Coffee from Jacksonville, Fla., to Nashville, Tenn., and return with returned or rejected shipments.

Granite from Elberton, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

Sugar from Port Wentworth and Savannah, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

No. MC-20782

Appendix D.

Origin	Destination	Commodities	1935 On and Prior to June 1	1935 After June 1
Tennessee	**Georgia**			
Murfreesboro	Atlanta	Cheese	15	14
"	Columbus	Cheese	4	2
"	Savannah	Cheese	6	7
	Florida			
"	Jacksonville	Cheese	6	1
"	Pensacola	Cheese	2	
"	Tampa	Cheese	3	1
Georgia	**Tennessee**			
Atlanta	Murfreesboro	Cantaloupe		1
"	"	Watermelon		2
Tennessee	**Alabama**			
Nashville	Birmingham	Eggs	1	3
"	"	Poultry	4	
"	"	Butter	2	
"	"	Meat	1	
"	Mobile	Butter	2	
"	"	Poultry	3	
"	Montgomery	Eggs	1	1
"	Gadsden	Meat		1
"	**Florida**			
"	Jacksonville	Butter	32	3
"	"	Eggs	1	
"	"	Poultry	6	
"	"	Cellophane	1	
"	St. Petersburg	Poultry	7	
"	"	Butter	1	
"	Orlando	Butter	8	1
"	Tampa	Butter	20	7
"	"	Cellophane	1	
"	"	Eggs		1

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Origin	Destination	Commodities	1935 On and Prior to June 1	1935 After June 1
Nashville	Pensacola	Poultry	1	
"	"	Butter	1	
"	"	Cheese	1	
	Georgia			
"	Selma	Cotton goods		1
"	Savannah	Felt basing		1
"	"	Felt base carpeting		1
"	"	Cotton bags	1	
"	"	Cheese	2	
"	"	Eggs	1	1
"	"	Butter	14	8
"	"	Poultry	11	2
"	"	Drums	1	
"	"	Cellophane	1	
"	"	Meat	5	4*
"	"	Cotton goods		1
"	"	Felt		1
"	"	Felt base rugs		1
"	Augusta	Poultry	5	
"	"	Butter	3	
"	"	Meat	1	
"	"	Cheese		1
"	Macon	Poultry	13	3
"	"	Butter	7	
"	"	Cheese		2
"	"	Eggs		1
"	Albany	Cotton bags	4	
"	Moultrie	Butter	5*	1
"	"	Poultry	4	1
"	"	Cellophane	1	
"	"	Paint		1
"	Brunswick	Butter	3	2
"	"	Poultry	5	1
"	Columbus	Butter	2	
"	"	Poultry	2	
"	"	Meat	3	2
"	"	Cheese		1
"	Waycross	Butter	6	2
"	"	Poultry	2	
"	Rome	Meat	7	11
"	"	Cheese		1
"	Gainesville	Cheese	1	
"	LaGrange	Cheese	3	1
"	"	Meat		3

No. MC-20783
Appendix D—Sheet 3

Origin	Destination	Commodities	1935 On and Prior to June 1	1935 After June 1
Tennessee	**Georgia**			
Nashville	Rossville	Cheese		1
"	Athens	Cheese		3
	North Carolina			
"	Charlotte	Butter	10	6
"	"	Poultry	1	1
"	"	Meat		
"	Raleigh	Poultry	18*	
"	"	Meat	12	
"	"	Butter	9*	
"	"	Cheese	2	
"	"	Calves and Pigs	1	
"	Greensboro	Meat	3	
"	"	Butter	1	
"	"	Poultry	1	
"	Wilmington	Butter	6*	3
"	"	Cheese	1	1
"	"	Poultry	1*	
"	"	Eggs	1	
"	Fayetteville	Poultry	2	
"	"	Butter	1	4*
"	Gastonia	Butter	1	3
"	"	Poultry	1	4
"	Hamlet	Butter	1	5
	South Carolina			
"	Greenville	Butter		1
"	"	Cheese		2
"	Columbia	Meat	24*	14
"	"	Butter	16	5
"	"	Poultry	13	4*
"	"	Cheese	4*	6*
"	"	Eggs	1	
"	"	Cellophane		1
"	Charleston	Poultry	11	4*
"	"	Butter	6	1
"	"	Eggs	2*	
"	"	Cheese	1	1
"	"	Cellophane		1
"	"	Meat	10	
"	Chester	Meat	2	
"	"	Butter	1	5

No. MC-20783
Appendix D—Sheet 4

Origin	Destination	Commodities	1935 On and Prior to June 1	1935 After June 1
Tennessee	**South Carolina**			
Nashville	Sumter	Butter	1	3
"	"	Poultry		1
"	Spartanburg	Butter		1
"	"	Cheese		1
Alabama	**Tennessee**			
Sylacauga	Nashville	Cotton-factory products	5	1
Huntsville	Nashville	Cotton-factory products	1	5
Birmingham	Nashville	Pins, pipes, rods, nuts, bolts, wire, and arm braces	1	
Florida				
Haines City	Nashville	Fruit juice	14	
Tampa	Nashville	Fruit juice	4	4
"	"	Tomatoes	1	
Jacksonville	Nashville	Coffee	21	
Winter Haven	Nashville	Fruit	1	
"	"	Fruit juice	1	
Plant City	Nashville	Vegetables	2	
Georgia				
Cordele	Nashville	Watermelons		1
"	"	Peanuts		1
Dublin	Nashville	Watermelons		5
Macon	Nashville	Floor mops		1
Scottdale	Nashville	Osnaburg (linen)		1
Gainesville	Nashville	Cotton-factory products		3
Moultrie	Nashville	Cotton-factory products	1	
Elberton	Nashville	Granite	3	11
Port Wentworth	Nashville	Sugar	1	

No. MC-20783
Appendix D—Sheet 5

Origin	Destination	Commodities	1935 On and Prior to June 1	1935 After June 1
Georgia	**Tennessee**			
Savannah	Nashville	Sugar	7	5
Commerce	Nashville	Cotton-factory products	2	
Trion	Nashville	Cotton-factory products	4	
New Holland	Nashville	Cotton-factory products	14	4
Poulan	Nashville	Cotton-factory products	9	
North Carolina				
Greensboro	Nashville	Cotton-factory products		11
Concord	Nashville	Cotton-factory products		2
Rockingham	Nashville	Cotton-factory products		1
Cedar Falls	Nashville	Cotton-factory products	3	
Rhodliss	Nashville	Cotton-factory products	2	
Charlotte	Nashville	Dry buttermilk	1	
Marion	Nashville	Cotton-factory products	2	
South Carolina				
Belton	Nashville	Cotton-factory products		2
Pelzer	Nashville	Cotton-factory products		2
Pacelot Mills	Nashville	Cotton-factory products	1	4
Clifton	Nashville	Cotton-factory products	3	
Iva	Nashville	Cotton-factory products	6	4
Enoree	Nashville	Cotton-factory products	2	
Fountain Inn	Nashville	Cotton-factory products	1	
Glendale	Nashville	Cotton-factory products	7	3
Converse	Nashville	Cotton-factory products	3	

* One or two of these shipments also contained one of two other perishable commodities: meat, butter, cheese, poultry, or eggs.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 6th day of January, A. D. 1945.

No. MC-20783

W. H. Tompkins Company Common Carrier Application

It appearing, That on May 29, 1941, the Commission, division 5, entered its original report and order, 29 M.C.C. 359, and that on July 1, 1943, the said division entered its report and order on reconsideration, 42 M.C.C. 349, in the above-entitled proceeding (which reports and orders also embraced No. MC-20783 (Sub-No. 1), W. H. Tompkins Company Extension of Operations—Seven States), granting applicant a certificate authorizing it to conduct certain operations as a common carrier by motor vehicle in interstate or foreign commerce, and otherwise denying the said applications;

It further appearing, That by order of February 10, 1944, upon consideration of the record in the above-entitled matters, the applicant's petition for reconsideration, the proceeding in No. MC-20783 was reopened for reconsideration upon the record as made, and the order of July 1, 1943, insofar as it denied the application in No. MC-20783, was vacated and set aside.

And it further appearing, That such reconsideration of the matters and things involved in that proceeding has been given, and that the Commission, Division 5, on the date hereof, has made and filed a second report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the reports and orders

of May 29, 1941, and July 1, 1943, are hereby referred to and made a part hereof:

It is ordered, That said application in No. MC-20783, except to the extent that it is granted in said second report on reconsideration, be, and it is hereby denied effective March 12, 1945.

By the Commission, division 5.

W. P. Bartel,
Secretary.

ORDER

Interstate Commerce Commission

No. MC 20783

W. H. Tompkins Company Common Carrier Application
Nashville, Tennessee

Present: William E. Lee, Commissioner, to whom the matter which is the subject of this order has been assigned.

Upon consideration of the record in the above-entitled proceeding; and good cause appearing therefor:

It is ordered, That the order entered in said proceeding on January 6, 1945, as subsequently modified to become effective June 30, 1945, in so far as it denied the application, be, and it is hereby, further modified so as to become effective July 31, 1945.

Dated at Washington, D. C., this 2nd day of June, A. D. 1945.

By the Commission, Commissioner Lee.

W. P. Bartel,
Secretary.

(Seal)

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil Action No. 603

W. H. TOMPKINS COMPANY, NOW TOMPKINS MOTOR LINES, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree[1] entered on July 8, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

[1] The court also made detailed Findings and Conclusions, though writing no opinion. One judge filed a short statement of dissent.

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Appeal was allowed on August 2, 1946, and appeal papers were served on August 6, 1946.[2]

The Commission's order dated January 6, 1945, granted appellant operating authority under the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act as amended (49 U. S. C. 306 (a)) as a common carrier by motor vehicle of certain specified commodities between certain points specified in the order, over irregular routes.[3] By the same order

[2] It does not appear that notice of appeal was served upon the Attorney General of the State of Tennessee, in accordance with the provisions of 28 U. S. C. 45a.

[3] Appellant was authorized to transport:

Dairy products, eggs, and poultry from Murfreesboro, Tenn., to points in Georgia and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Packing-house and dairy products, eggs, and poultry from Nashville to points in Georgia, North Carolina, and South Carolina, those in Alabama on and east of U. S. Highway 31 and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Cotton-factory products from points in Georgia, North Carolina, and South Carolina and those in Alabama on and east of U. S. Highway 31, to Nashville, and return with returned or rejected shipments.

Canned and fresh fruits and vegetables and canned fruit juices from points in Florida on and north of Florida Highway 30 to Nashville, and return with returned or rejected shipments.

Coffee from Jacksonville, Fla., to Nashville, Tenn., and return with returned or rejected shipments.

Granite from Elberton, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

Sugar from Fort Wentworth and Savannah, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

appellant was authorized to transport general commodities between Nashville, Tennessee, and Atlanta, Georgia, over a regular route; but that portion of the Commission's order was not assailed by appellant and is not involved in the present suit.[4] Appellant claimed that it should have been given a larger radial base territory, consisting of Nashville, Tennessee, and points within 15 miles thereof and Murfreesboro, Tennessee; and that it should have been given the right to transport general commodities between the said base area and "points and places in Georgia, North Carolina, South Carolina, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida Highway 30."[5]

In the Commission's report and order of January 6, 1945, it reaffirmed the findings made in a prior report on reconsideration, dated July 1, 1943, 42 M. C. C. 349. The extent of the operat-

[4] Appellant also holds extensive authority granted in another proceeding (No. MC–20783 (Sub. No. 1)) and set forth in Appendix B to the Commission's report of January 6, 1945.

[5] Paragraph VI of complaint. The Commission has classified as "radial" that type of operation which is conducted between a central "base area" and an outlying peripheral area. Radial operation is analogous to movement along the spoke of a wheel, between the hub and the circumference. Conversely, the pattern of operation is designated as "nonradial" when transportation is furnished between any points lying within the territory which a carrier serves. See *Classification of Motor Carriers*, 2 M. C. C. 703, 709; *Goncz* v. *United States*, 48 F. Supp. 286 (D. Mass., 1942). That appellant's operations are "radial" is undisputed.

ing authority there granted was the same as that granted in a prior report and order of May 29, 1941, 29 M. C. C. 359. That order was entered before this Court's decision on March 2, 1942, in *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, and was set aside by the United States District Court for the Middle District of Tennessee, Nashville Division, on July 7, 1942, in Civil Action No. 258. The court concluded that it was impossible to say that in making its order of May 29, 1941, the Commission had applied the standards and tests prescribed in the *Carolina* case, and remanded the cause to the Commission for making the basic and essential findings required by the *Carolina* case.

On this appeal appellant contends, as it did in the court below, that the Commission's order of January 6, 1945, was in violation of the District Court's decree of July 7, 1942, in Civil Action No. 258; and that the Commission should have granted appellant authority to transport general instead of specific commodities; and that the Commission should have granted authority to operate from and to a base territory more extensive geographically than as delimited by the Commission in its order.

It is submitted by appellees that the appeal presents no substantial questions, and that the decree of the District Court should be affirmed without argument.

With respect to appellant's first contention, it is clear that the District Court's decree of July 7, 1942, in Civil Action No. 258, did not preclude the Commission from validly making its order of January 6, 1945. In fact the Court's decree setting aside the Commission's order of May 29, 1941, remanded the cause to the Commission for findings, and obviously invited, if it did not require, exercise by the Commission of its statutory function of considering, passing upon, and deciding the issues involved in the proceeding in accordance with applicable law and the evidence of record. Plainly the decree did not prevent the Commission from taking such action.

Nor could the District Court's decree dealing with the Commission's order of May 29, 1941, constitute a determination, under the doctrine of *res judicata,* that the Commission's subsequent order of January 6, 1945, is in any respect unlawful or invalid. The mere fact that the same parties are involved in a second suit in the same court would not make the rule of *res judicata* applicable to a separate, subsequent order of the Commission any more than that rule would be applicable in a second tort action by appellant against a railroad company for damages arising out of a second collision between the railroad company's trains and appellant's trucks.

The District Court's decision of July 7, 1942, did not prescribe what result the Commission should reach upon properly applying the appro-

priate legal standards in passing upon appellant's application. That court merely held that it was not satisfied that such standards had been applied in reaching the order then under review, an order issued prior to the date of this Court's decision in the *Carolina* case. The Commission has now conscientiously endeavored to apply the standards set forth by this Court in the *Carolina* case, and has reached the decision embodied in the order of January 6, 1945. This decision cannot be overthrown by a mechanical application of the rule of *res judicata,* merely because the operating authority granted is identical in extent with that delineated in the previous order. Just as in the case of the solution to a problem in arithmetic, the fact that the same answer was arrived at by the right process as had previously been reached by other methods does not invalidate the Commission's conclusion. Appellant's contention on this point is obviously unsound.

Nor does appellant stand on stronger ground in challenging the geographical and commodity restrictions contained in the Commission's order. The decisions of this Court, particularly the *Carolina* case itself, make it plain that the precise scope of the operating authority to be granted to a motor carrier making application under the "grandfather clause" is for the Commission to determine, upon the evidence of record. Both the geographical area to be served, and the commodities transportation of which is to be author-

ized, are matters which must be determined by the Commission, in the light of the evidence as to applicant's operations on and since June 1, 1935, the "grandfather" date.

It is well-settled that proof of substantial (and not merely nominal, sporadic, or incidental) service is required; that the commodities which a carrier is authorized to transport may be limited to particular specified commodities, when it appears that substantial service performed by it in the past has been confined to such commodities, the carrier's "holding out" or willingness to transport general commodities being properly disregarded when no substantial service of that character has been performed by the applicant; and that an applicant's status may vary in different parts of the territory served, its service in one direction, for example, being different from that in the opposite direction.

These principles are summarized in the *Carolina* case as follows:

> The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. * * *
>
> It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities. * * * Or the service actually rendered may have been confined to such a few commodities

> that his holding out or willingness to carry a much larger class may be disregarded. * * * an applicant's status may vary from one part of the territory to another or be different in north-bound shipments than in south-bound shipments. (315 U. S. at 480, 483, 486.)

Other recent decisions of this Court upholding the Commission's imposition of commodity restrictions and geographical restrictions, respectively, are *Deaton Truck Line, Inc.* v. *United States,* No. 215, October Term 1945, aff'd October 9, 1945, and *Howard Hall, Inc.* v. *United States,* No. 627, October Term 1945, aff'd May 6, 1946.

The basis of the Commission's denial of authority to serve the metropolitan area within 15 miles of Nashville as part of appellant's base territory is clearly shown by the following extract from the Commission's report:

> As previously stated, applicant seeks as one of its base territories, Nashville and all points within 15 miles thereof. Although there are a number of small towns and villages within that area, a study of the abstracts of shipments discloses that Nashville is the only point within that area ever served by applicant either prior or subsequent to the statutory date. Shipments from one point only, during the representative periods of 1935, 1936, and 1937, is, in our opinion, insufficient to establish "grandfather" rights to serve all points within a thickly populated area 30 miles in

> diameter. Therefore, since Nashville is the only point ever served within the area sought we conclude that applicant's Nashville base territory should be confined to Nashville.

In view of the foregoing facts found by the Commission, it is obvious that its order rests upon a "rational basis" and should not be disturbed by this Court on appeal. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

With respect to commodity restrictions it is equally plain that the Commission's order was sustained by the facts and was fully warranted by the principles established in the *Carolina* case. In this connection the Commission found, as to service from Murfreesboro:

> In view of applicant's very limited actual outbound service from Murfreesboro prior to the statutory date (the transportation of only one commodity, cheese), we may disregard its claimed holding out to transport general commodities. * * *

With respect to operations out of Nashville, the Commission found:

> A study of Appendix D discloses that applicant transported 371 shipments outbound prior to June 1, 1935. All but 10 of these consisted of the perishable commodities of meat, butter, cheese, poultry, and eggs. The other 10 shipments consisted of 5 of cotton bags, 4 of cellophane, and 1 of drums. In 1935, after the statutory date,

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applicant transported 155 shipments and all but 9 of these consisted of meats, butter, cheese, poultry, and eggs. The other 9 consisted of 2 shipments of cotton piece goods, 2 of cellophane, and 1 each of paint, felt, felt basing, felt base rugs, and felt base carpeting.

The aforementioned movements of drums, paint, and cellophane were small less-than-truckload shipments, ranging in weight from 23 to 679 pounds per shipment, from Neuhoff Packing Co., and Swift & Co., to Swift & Co. Four of the shipments of cotton bags were consigned to Swift & Co., and 1 was consigned to "Armour Fert Wks." All of the non-perishable commodities transported during the critical period may reasonably be presumed to have been accommodation shipments for the packing companies for whom applicant transported perishable commodities. Of the non-perishable commodities transported by applicant in 1935, after the statutory date, only cellophane moved prior to the statutory date. Cotton piece goods falls within the same general class of commodities as cotton bags but the other commodities do not fall within the same general class with any commodity that moved prior to the statutory date.

Applicant's outbound operations were expanded in 1936 and 1937. In 1936, over 600 shipments were transported outbound of which 36 consisted of commodities other than packing-house and dairy products, poultry, and eggs. Of these only 1 and

part of another shipment consisted of cellophane scrap and none of these shipments consisted of cotton piece goods or cotton bags. Although applicant transported several commodities in 1936 and 1937 that were not transported outbound prior to the statutory date, its principal outbound operations continued to be the transportation of the aforementioned perishable commodities. The sporadic transportation of the 3 non-perishable commodities transported by applicant during the critical period, even if we assume that they were not accommodation shipments for the packing plants served, is insufficient to broaden applicant's special-commodity service comprising the transportation of packing-house and dairy products, poultry, and eggs, all of a perishable nature, into a general-commodity service embracing numerous unrelated classes of property.

Obviously, the specialized service actually rendered outbound has not been consistent with applicant's alleged holding out of a much broader service, and therefore we believe that its claimed holding out to carry a much wider variety of commodities should be disregarded. We conclude that applicant has been engaged in bona fide operations outbound on and continuously since June 1, 1935, as a motor common carrier of only special classes of commodities; packing-house products, dairy products, poultry, and eggs.

Concerning the commodities transported to Nashville from destination territory, the Commission found:

> A review of the evidence previously set forth herein discloses a wide variance between applicant's purported holding out and its actual operations on and prior to June 1, 1935. Its outbound operations were limited to a narrow group of commodities according to the State and individual points served. Its inbound shipments from Alabama, with one exception, North Carolina, and South Carolina, with one exception, consisted of cotton-factory products. Similarly all shipments from Georgia points inbound during the critical period were of cotton-factory products, except those of sugar and granite which were confined to specified points. Inbound shipments from Florida consisted of entirely different commodities than those from the other States. For instance no fruits and vegetables were originated at points in any State other than Florida, coffee originated only at Jacksonville, sugar at Savannah and Port Wentworth, and granite at Elberton. Obviously applicant could have secured other commodities inbound and could have secured such commodities as sugar, coffee, and granite from other points within the destination territory sought, if it had endeavored to conduct a regular general commodity operation. It is clear, therefore, that applicant restricted its inbound operations to

the transportation of the respective commodities described and from the particular points and areas set forth above, and the grant of authority herein will be limited accordingly.

It is a well known fact, of which we may take judicial notice, that Birmingham is an important iron and steel center; however, only one shipment of such commodities was transported from there prior, and one subsequent to the statutory date. There are also a number of well known and important ports, and industrial and distribution centers, such as Nashville, Birmingham, and Mobile, Ala., Augusta and Savannah, Ga., Jacksonville and Tampa, Fla., Charlotte, Raleigh, and Wilmington, N. C., and Charleston and Columbia, S. C., included in the involved territory which ship and distribute a wide variety of commodities. However, only coffee was transported from Jacksonville, and sugar only from Savannah and Port Wentworth. Granite was shipped from only one point, Elberton, Ga., and no fruits and vegetables or peanuts originated in Alabama or Georgia prior to the statutory date although the record shows that the principal commodities moving from these two States to the Nashville area were sugar, peanuts, fruit, and canned goods, and that Georgia has big marble quarries. Considering the points and territory served by applicant it is inconceivable that it was unable to secure shipments of more and varied commodities and that such

commodities as sugar, coffee, and granite could not have been obtained from other points if it had endeavored to render a regular general-commodity operation.

In view of the foregoing facts, it is clear that the Commission was correct in holding that appellant was not a carrier of general commodities. The essential distinction between a carrier of general commodities and a carrier of special commodities is that the former, unlike the latter, transports a "*wide variety*" of commodities, a "*large group*" of articles. (*Carolina* case, 315 U. S. at 483, 484, 486). The question for decision by the Commission in each case where it must determine in which of these categories a particular carrier is to be placed is whether the applicant's coverage of commodities is sufficiently broad and representative to support a finding that the carrier was rendering a *bona fide* comprehensive service to the public in the trasnportation of the whole range of general commodities available for transportation. The very generality and variegated character of the service rendered by a carrier transporting a multiplicity of general commodities might result, as an extreme case, in his having transported a particular item only on a few occasions, or once, or even not at all. But appellant's operations are not of that sort. Appellant transported repeatedly and in great volume the particular commodities in which it specialized, rather than handling a *bona fide* assortment of miscellaneous articles constituting the

"wide variety" which the law requires in order to qualify as a carrier of general commodities.

Appellant views the *Carolina* case as forbidding commodity restrictions once it is found that plaintiff is a common carrier. But, as has been stated above, the *Carolina* case expressly holds that common carrier status is not incompatible with limitations authorizing transportation of only special commodities. A common carrier may be a common carrier of special commodities or even of only one commodity. Notwithstanding this narrow range of service, the carrier, if serving the public generally with respect to shipments of that commodity, would be a common carrier, and not a contract carrier or private carrier. The rules which the *Carolina* case establishes with respect to the consequences attached to the status of a common carrier of general commodities become applicable only after it has first been determined that the applicant is a common carrier of general commodities. That is the case only after it has been established that the applicant has transported a sufficiently wide variety of commodities to warrant the conclusion that the carrier is affording the shipping public *bona fide* service covering the whole range of its transportation needs (other than those relating to shipments requiring special equipment and not included within the designation "general commodities"). Obviously, upon the evidence of record in this case, the Commission could not properly have found that appellant

was performing *bona fide* service as such a common carrier of general commodities.

Appellant's contention that the Commission did not view the evidence as a whole, but analyzed it geographically, is merely a repetition of the argument which was rejected by this Court in *Howard Hall Company* v. *United States,* No. 627, October Term 1945, affirmed May 6, 1946. Likewise, appellant's claim that the Commission "refused to consider" certain evidence is as unimpressive here as it was in the *Howard Hall* case. The Commission's report clearly shows that it gave appropriate consideration to all pertinent evidence,[6] and it is obvious that appellant's objection to the Commission's action amounts to nothing more than an assertion that the Commis-

[6] Appellant urges that the Commission should have considered the variety of commodities transported in appellant's regular route operation between Nashville and Atlanta in determining whether or not appellant was entitled to authority to transport general commodities in its irregular route operation, involved in the present suit. Manifestly it was proper for the Commission to recognize the nature of these separate and different operations, and not to commingle or confound the evidence relating to them. With regard to the regular route operation, the Commission granted authority to transport general commodities, and that part of the Commission's order of January 6, 1945, is not involved in the present suit. Obviously the evidence relating to the regular route operation could not be reutilized as proof of a different operation, in support of a second grant of operating authority either to the same or to another applicant. *Akin* v. *United States*, 62 F. Supp. 391 (W. D. La., 1945), aff'd March 11, 1946; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 53, 54.

sion, in the exercise of its discretion, reached a result different from that desired by appellant. But it is well-settled law that determination of the weight, credibility and value of evidence is a function entrusted to the Commission. The fact that the Commission's action may not harmonize with certain evidence does not indicate any refusal on the part of the Commission to accord appropriate consideration to such evidence. It indicates merely a lack of probative weight in that evidence, the determination of which is the function of the Commission alone. The record clearly shows that the Commission's findings were warranted by and in conformity with the evidence.[7]

[7] The exhibits showing transportation performed, and the late-filed exhibit showing the extent of the casual and incidental shipments of cellophane, bags, *et cetera*, which appellant hauled for the accommodation of the packing houses it served (Tr. 37-40), make it abundantly clear that the only *bona fide* service rendered by appellant during the "grandfather" period is that which the Commission's order authorizes appellant to continue to perform. Even the oral testimony of appellant's witness corroborates the findings of the Commission with respect to the limited and restricted character of service performed (Tr. 36, 38, 61). Appellant relies heavily upon the testimony of the witness that appellant handled all commodities which moved within the territory served (except stoves); but in the light of the facts of general knowledge, of which judicial notice may be taken, regarding the location and character of the industries and traffic available in the territory served, it is obvious that the Commission, in weighing the value of the evidence, was not required to place implicit faith in an obviously incorrect statement made by an interested witness. This is particularly true when the statement is contradicted by the more specific testimony of the same witness, as well as by all the documentary evidence.

For the foregoing reasons, it is clear that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

AUGUST 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINE, INC., Plaintiff-Appellant, vs. UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants-Appellees.	No. 681.

MOTION

For Leave to File Petition for Rehearing or Reconsideration of the Decision of December 9, 1946.

To the Chief Justice and Members of the Supreme Court of the United States:

Comes now W. H. Tompkins Company, now Tompkins Motor Line, Inc., Appellant in the above styled case, and moves the Court for leave to file a petition for reconsideration of the Court's decision of December 9, 1946, and for grounds of the motion shows:

The Court on December 9, 1946, rendered a decision granting appellee's motion to affirm. Under Rule 33 of the Rules of this Court, appellant was allowed twenty-five

days thereafter within which to file a petition for rehearing, this period expiring on January 3, 1947.

Appellant prepared and had printed forty copies of a petition for reconsideration and the same was forwarded to the Clerk of this Court, but the Clerk now advises appellant that this petition reached his office on January 4, or one day late.

Your movant further shows that since receiving said advice from the Clerk, its attorneys have consulted with printing company which mailed the said petition, and are advised by said printing company that the original signed copy of said petition was mailed from St. Louis, Missouri, on January 2 by air mail, and movant shows that under normal conditions said petition should have reached the Clerk's office on January 3.

Appellant is further advised that 39 additional copies of said petition were expressed to the Clerk on the same day.

Your movant further shows that a heavy snow storm occurred in the Central and Eastern Section of the country about December 31 and movant is advised that for several days thereafter all planes were grounded and no air mail moved. Your movant therefore alleges that its petition was delayed in the mails, through no fault of appellant and from causes beyond its control.

Wherefore, premises considered, movant prays that it be granted leave by this Court to file its petition for reconsideration or rehearing in this cause.

Respectfully submitted,

JAMES W. WRAPE,
1407 Sterick Building,
Memphis, Tennessee,
Attorney for Appellant.

Certificate of Service.

I, James W. Wrape, hereby certify that a copy of the foregoing motion was served upon W. P. Bartel, Secretary, Interstate Commerce Commission, Mr. Allan Crenshaw, Attorney for said Commission, the Attorney General of the United States, and Mr. Horace Frierson, United States Attorney, and Mr. Wendell Berg, Assistant Attorney General.

.....

James W. Wrape.

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CHARLES ELMORE CROP

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINE, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

No. 681...

PETITION FOR RECONSIDERATION OF YOUR DECISION OF DECEMBER 9, 1946.

JAMES W. WRAPE,
Sterick Building,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

W. H. TOMPKINS COMPANY, Now TOMPKINS MOTOR LINE, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

No. .....

PETITION FOR RECONSIDERATION OF YOUR DECISION OF DECEMBER 9, 1946.

To the Chief Justice and Members of the Supreme Court of the United States:

Your petitioner, being deeply aggrieved in the decision of this court, dated the 9th day of December, 1946, wherein you sustained the motion of appellee to dismiss our appeal for lack of the presentation of a substantial federal question, respectfully seeks your further consideration of this

matter to the end that this plaintiff be permitted to present its case upon its merits, and upon such further consideration you note probable jurisdiction, and in support of such plea, your petitioner shows to the court as follows:

PRESENT STATUS OF CASE.

On the 9th day of December, 1946, you entered your order reading as follows:

> **"Per Curiam: The motion to affirm is granted and the judgment is affirmed. United States v. Carolina Freight Carriers Corporation, 315 U. S. 475. Mr. Justice Black, Mr. Justice Reed, and Mr. Justice Douglas are of opinion that probable jurisdiction should be noted."**

PRIOR PROCEEDINGS.

This case involves a direct appeal from a final decree entered on July 8, 1946, of a specially constituted District Court of Three Judges, established pursuant to the Urgent Deficiency Act of October 2, 1913, which decree dismissed Appellant's complaint to set aside an order of the Interstate Commerce Commission. An appeal from this decree was allowed on August 2, 1946, and the motion to affirm was filed in the office of the Clerk of the United States District Court for the Middle District of Tennessee (Nashville Division), at Nashville, Tennessee, on August 19, 1946. Thereafter, a reply to this motion was made on September 20, 1946. In that reply, at pages 2 to 16, inclusive, we have given you a detailed account of prior proceedings before the Interstate Commerce Commission (in Docket MC-20783) as well as an account of a prior proceeding in the United States District Court at Nashville (Civil Action No. 258), wherein on July 7, 1942 this same application was remanded to the Interstate Commerce Commission and that Commission's order was set aside.

The appellant maintains that it is entitled to file this petition pursuant to the provisions of Rule No. 33, which reads as follows:

Rule 33. Rehearing.

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session, and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

BASIS FOR RELIEF.

The appellant only asks that it be afforded an opportunity to present its case for a determination on its merits. The motion for affirmance, while adroitly presented, was based upon generalizations, which denied to appellant an opportunity to squarely meet the issue which would be raised upon a presentation upon the merits of the case.

Upon reconsideration of this matter, it seems to us that the following factors should induce the court to give this case the kind of a review which only a presentation on its merits can assure.

In this case Mr. Tompkins, who still owns and controls appellant, like the Carolina Freight Carriers, Inc.,[1] and the Barrett Line,[2] seeks to continue a pioneer operation under the grandfather clause claims provision of the Interstate

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1 Carolina Freight Carriers v. U. S., 315 U. S. 475.

2 Barrett Lines v. U. S., 326 U. S. 179.

Commerce Act,[3] which you once described as a "grant of rights"[4] made by Congress to those of a class like this appellant.

The fact that the Interstate Commerce Commission found it necessary to issue three separate reports and orders,[5] all on a single record, in its effort to finally dispose of appellant's "grandfather clause" application would seem to indicate either a difficulty in the application of the proper standards, or a determined intent to support a predetermined conclusion by requisite findings.

The fact that the same United States District Court[6] decided appellant's two identical cases,[7] based upon a similar Interstate Commerce Commission record,[8] in directly opposite ways, would seem to indicate the difficulty involved in a proper disposition of this case, and would indicate the necessity for a disposition of the matter upon a presentation on the merits.

The fact that the District Court in Civil Action 258 set aside the Commission's order of May 29, 1941 based upon your opinions in the Hall and Carolina Carriers Cases, supra,[9] and the further fact that Judge Davies, in Civil Action 603, bases his dissent from the majority opinion upon your decision in those same two cases,[10] and the fur-

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3 Title 49 USCA 306 (a).

4 Carolina Freight Carriers v. U. S., supra.

5 See the Commission's decisions of May 29, 1941, July 1, 1943, and January 6, 1945.

6 In each instance the Court consisted of Circuit Judge Hicks and District Judges Taylor and Davies.

7 Civil Action 258 and Civil Action 603.

8 The only difference in the two records presented was that the latter case included the Commission's reports dated July 1, 1943, and January 6, 1945, which were served subsequent to the time the application was remanded in the first case.

9 See page 66 of our reply.

10 See page 72 of our reply.

ther fact that the Commission, in both its July 1, 1943, and January 6, 1945, orders base their action upon your decisions in the Carolina and Hall cases, and the further fact that both appellant[11] and appellees[12] have relied upon the dicta contained in those same two decisions to support their respective positions in this case, and the further fact that you, in support of your affirmance of appellees' motion, cite those same cases as authority, all should clearly indicate the need for clarification as to the manner in which the principles which you have promulgated in those cases should be applied to "grandfather clause" cases like the instant one.

The fact that the facts in the instant case are very similar to those reported in the Hall and Carolina Carriers cases, and the further fact that the validity of the commodity restrictions present the only issue, and the still further fact that after your decisions in those two cases, the Commission afforded those carriers the relief here sought, should be persuasive that at least an investigation of the record on the merits might avoid what is, to this appellant, disaster.

CONCLUSION.

We accept the fact that your decision was based upon the record as presented at the time of your decision, which was of necessity without the full record, and only with one argument of the parties restricted to the narrow scope of the motion.

We further accept the fact that the court is burdened by any number of frivolous appeals and that if the court is to efficiently perform its assigned functions, all cases

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11 See page 35 of our reply.

12 See pages 5, 6, 9 of Appellee's Motion.

which do not seem to involve substantial questions must be repelled at the threshhold.

Only because the effect of your decision in the Hall and Carolina cases are so important to the entire trucking industry and only because your affirmance of the appellees' motion in this case, without considering it on its merits, deprives owner of the appellant of the fruits of his life's industry and sets aside from him what you have heretofore described as Congress' "Grant of Rights" to him, do we ask you to review your prior action in the case.

As we realize that we, in our reply to appellees' motion, had little opportunity but to indulge in generalities, we sincerely believe that appellant is entitled to the relief which it seeks and we further believe that in an examination of this case on its merits such relief will be granted, we therefore ask that you reconsider your action on appellee's motion, and upon such reconsideration that you overrule such motion.

Respectfully submitted,

JAMES W. WRAPE,
Sterick Bldg.,
Memphis, Tenn.,
Attorney for Appellant.

Certificate of Counsel.

I, James W. Wrape, attorney for appellant, hereby certify that the foregoing petition is not presented for delay, but in good faith for the reasons stated in the said petition.

....., James W. Wrape.

Certificate of Service.

I, James W. Wrape, hereby certify that a copy of the foregoing petition was served upon W. P. Bartel, Secretary, Interstate Commerce Commission, Mr. Allan Crenshaw, attorney for said Commission, the Attorney General of the United States, and Mr. Horace Frierson, United States Attorney, and Mr. Wendell Berg, Ass't Attorney General.

....,

James W. Wrape.

No. 681. W. H. TOMPKINS CO., NOW TOMPKINS MOTOR LINES, INC., *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Middle District

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of Tennessee. December 9, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *James W. Wrape* and *Harold G. Hernly* for appellant. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees.